(32,794)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 342

KRAUSS BROTHERS LUMBER COMPANY, PETITIONER,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT, ETC.; MOBILE & OHIO RAILROAD COMPANY AND ALABAMA GREAT SOUTHERN RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COMPLAINT

Filed March 20, 1923

Chas. J. Allison, Clerk.

UNITED STATES OF AMERICA

DISTRICT COURT OF THE UNITED STATES

For the Northern District of Alabama, Southern Division

The President of the United States of America to the Marshal of said District—Greeting:

You are hereby commanded to summon JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS AS AGENT, under and by virtue of Section 206 Transportation Act of 1920, MOBILE & OHIO RAILROAD COMPANY, a corporation, and ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a corporation, engaged in interstate commerce and subject to Interstate Commerce Act, to appear before the Honorable District Court aforesaid, at the place of holding said Court at BIRMINGHAM, ALA., on the first Monday of September next, to answer the complaint of KRAUSS BROTHERS LUMBER COMPANY, who is citizen of the State of Louisiana, and have you then and there this writ.

Witness, the HON. W. I. GRUBB, Judge of the District Court of the United States for the Northern District of Alabama, this 20th day of March, in the year of our Lord, One Thousand Nine Hundred and Twenty-Three.

Issued the 20th day of March, in the year of our Lord, One Thousand Nine Hundred and Twenty-Three.

Attest: CHAS. J. ALLISON,
Clerk U. S. District Court, Northern District of Alabama.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DIVISION OF THE NORHERN DISTRICT OF ALABAMA

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff.

vs.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT under and by virtue of Section 206, Transportation Act of 1920, MOBILE & OHIO RAILROAD COMPANY, a corporation, and ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a Corporation, Defendants.

COUNT ONE.

Plaintiff claims of the defendants two thousand eight hundred ninety-four (2894) dollars for money on the first day of June, 1918, received by defendants to the use of the plaintiff, which sum of money, with the interest thereon at the rate of six (6) per cent. per annum, is still unpaid. The plaintiff also claims of the defendants a reasonable fee for its attorneys as provided by statute.

Said claim is based upon facts which are more particularly set out in that certain report and order of the Interstate Commerce Commission, a full, true and correct copy of which is hereunto atached, marked "Exhibit A," and is hereby expressly made a part of this count.

Complainant is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, Louisiana. The defendants, as railroad common carriers engaged in interstate commerce and subject to the Interstate Commerce Act, unlawfully collected demurrage and reconsignment charges on carload shipments of lumber, shipped between November 1, 1917, and January 12, 1918, originally billed to Meridian, Mississippi, Jackson and Chattanooga, Tennessee, and reconsigned at those points to numerous destinations north and east thereof. Plaintiff seeks recovery herein of said unlawful charges wrongfully exacted of it as aforestated.

COUNT TWO.

Plaintiff claims of the defendants four thousand five hundred thirty (4530) dollars for money on the first day of July, 1918, received by defendants to the use of the plaintiff, which sum of money, with the interest thereon at the rate of six (6) per cent. per annum, is still unpaid. The plaintiff also claims of the defendants a reasonable fee for its attorneys, as provided by statute.

Said claim is based upon facts which are more particularly set out in that certain report and order of the Interstate Commerce Commission, a full, true and correct copy of which is hereunto attached, marked "Exhibit A," and is hereby expressly made a part of this count.

Complainant is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, Louisiana. The defendants, as railroad common carriers engaged in interstate commerce and subject to the Interstate Commerce Act, unlawfully collected demur-

rage and reconsignment charges on carload shipments of lumber, shipped between November 1, 1917, and January 12, 1918, originally billed to Meridian, Mississippi, Jackson and Chattanooga, Tennessee, and reconsigned at those points to numerous destinations north and east thereof. Plaintiff seeks recovery herein of said unlawful charges wrongfully exacted of it as aforestated.

COUNT THREE.

Plaintiff claims of the defendants two thousand nine hundred thirty-two (2932) dollars for money on the 20th day of March, 1918, received by defendants to the use of the plaintiff, which sum of money, with the interest thereon at the rate of six (6) per cent. per annum, is still unpaid. The plaintiff also claims of the defendants a reasonable fee for its attorneys as provided by statute.

Said claim is based upon facts which are more particularly set out in that certain report and order of the Interstate Commerce Commission, a full, true and correct copy of which is hereunto attached, marked "Exhibit A," and is hereby expressly made a part of this count.

Complainant is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, Louisiana. The defendants, as railroad common carriers engaged in interstate commerce and subject to the Interstate Commerce Act, unlawfully collected demurrage and reconsignment charges on carload shipments of lumber, shipped between November 1, 1917, and January 12, 1918, originally billed to Meridian, Mississippi, Jackson and Chattanooga, Tennessee, and re-

consigned at those points to numerous destinations north and east thereof. Plaintiff seeks recovery herein of said unlawful charges wrongfully exacted of it as aforestated.

BRENTON K. FISK,
JOHNSON & ELKINS,
Attorneys for Plaintiff.

EXHIBIT A

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of November, A. D., 1922.

No. 11881

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

No. 11881 (Sub. No. 1)

SAME

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA TENNESSEE & NORTHERN RAILROAD CORPORATION, ET AL.

It appearing, That on March 2, 1922, the commission entered its report in the above-entitled proceedings, which is hereby referred to and made a part hereof, and these proceedings now coming on for further considera-

tion on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question; we find that complainant is entitled to awards of reparation from the defendants named in the following table in the amounts set opposite their respective names, with interest:

Defendants	*Amounts*	*With Interest From*
James C. Davis, Director General of Railroads, as Agent	$2,894.00	June 1, 1918
Mobile & Ohio Railroad Company and James C. Davis, Director General of Railroads, as Agent	4,530.00	July 1, 1918
Alabama Great Southern Railroad and James C. Davis, Director General of Railroads, as Agent	2,932.00	March 20, 1918

It is therefore ordered, That the defendants named in the above table be, and they are hereby, authorizd and directed to pay unto complainant, Krauss Brothers Lumber Company, on or before December 28, 1922, the amounts set opposite their respective names in said table, with interest thereon at the rate of 6 per cent. per annum from the dates therein set forth, as reparation on account of illegal demurrage and reconsignment charges assessed on numerous carload shipments of lumber reconsigned at Meridian, Miss., Jackson and Chattanooga, Tenn.

By the Commission:

GEORGE B. McGINTY,
Secretary.

(SEAL)

EXHIBIT A—Continued

No. 11881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

Submitted November 22, 1921. Decided March 2, 1922.

Demurrage and reconsignment charges assessed on carload shipments of lumber reconsigned at Meridian, Miss., Jackson, and Chattanooga, Tenn., found illegal. Reparation awarded.

Harry S. Elkins and Ross H. Johnson for Complainant.

H. L. Walker, Alex M. Bull, and John F. Finerty for Director General of Railroads.

H. L. Walker for Mobile & Ohio Railroad Company.

REPORT OF THE COMMISSION.

Division 2, Commissioners Daniels, Esch, and Campbell. By Division 2:

Exceptions were filed by the complainant and by the Director General of Railroads, as Agent, to the report proposed by the examiner, and the issues were orally argued.

Complainant is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. It alleges that defendants unlawfully collected demurrage and reconsignment charges on carload shipments of lumber, shipped between November 1, 1917,

and January 12, 1918, originally billed to Meridian, Miss., Jackson, and Chattanooga, Tenn., and reconsigned at those points to numerous destinations north and east thereof. Reparation only is sought.

The lumber was loaded at mills with which complainant had contracts, located at various points in Mississippi, Alabama, Louisiana and Texas. The shipments moved into Meridian and Jackson over the Mobile & Ohio and into Chattanooga over the Alabama Great Southern. Most of them were placed in transit before being sold, so that complainant did not know the ultimate destination at the time they were started. Prior or subsequent to arrival at the reconsigning points the lumber was sold to purchasers at points in Pennsylvania, Kentucky, New Jersey, West Virginia Ohio, Indiana, and New York, and orders were transmitted to defendants directing reconsignment to the latter points. These orders defendants either refused to accept or in any event to comply with immediately, because embargoes were in effect against the points of destination from the original points of shipment, and from the reconsigning points when the shipments originated. Demurrage was assessed for the resulting detention of the cars. In some instances reconsignment charges also were collected, which defendants admit was done without tariff authority. Some of the lumber was unloaded and stored at the reconsigning points, but most of the shipments were held in the cars and moved to destinations as the embargoes were lifted from time to time. These embargoes were brought about by severe congestion of traffic throughout the east during the period in question and were constantly being

modified, cancelled, and restored to meet particular emergencies.

Complainant does not question the reasonableness or necessity of the embargoes, but contends that as defendants' tariffs contained no provision against reconsignment to an embargoed point, detention of the cars was due to defendants' inability to fulfill the obligations imposed by the tariffs, and that the charges were therefore illegal. On January 13, 1918, rules became effective prohibiting reconsignment when in conflict with embargoes.

Defendants insist that complainant knew before the shipments were tendered that embargoes were in effect throughout the territory in question, and as shipments could not have been made either from the original points or locally from the points of reconsignment, billing of the shipments to the latter points was for the purpose of evading and nullifying the embargoes. Complainant admits it knew that embargoes were in effect generally throughout the territory in question, but states that since the final destinations were not known at the time shipments were started it could have had no knowledge that they were under embargo. It had been complainant's practice for years to reconsign at these same points, and it disclaims any intention on its part to evade the embargoes.

We have repeatedly held that when tariffs contain no restriction against reconsignment to embargoed points, demurrage charges may not be assessed for the car detention resulting therefrom. Reconsignment Case, 47 I. C. C. 590, 634; Wood v. N. Y., P. & N. R. R. Co., 53 I. C.

C. 183; Atlantic Lumber Co. vs. N. Y. P. & N. R. R. Co., 57 I. C. C. 129.

Defendants admit that demurrage should not be assessed if the final destinations were not under embargo when the shipments left the point of origin, but contend that if the points of final destination were under embargo at the time the shipments started and at the time of reconsignment the carriers are no more required to reconsign to such points than to accept the shipments at the points of origin. They argue that since the right of reconsignment attaches as of the date of shipment, even if the order be given subsequently, and since there was no obligation to accept the shipments at points of origin on account of the embargoes, there was likewise no obligation to reconsign. The obligation to accept articles tendered for transportation is governed by general principles of law, while the obligation to reconsign is determined by rules lawfully on file with us. The right to refuse shipments temporarily for good cause by the establishment of embargoes, which are not required to be filed with us, is recognized. The right to reconsign depends entirely upon the construction of rules, which are required to be filed in the same manner as rates, and if the carriers do not restrict such rules to the extent of their capacity to perform the service, the shipper can not be held liable for the detention of cars when it is not directly responsible for such detention and can not abate the cause thereof, as in the case of an embargo, which is a disability of the carrier.

We find that the demurrage and reconsignment charges assailed were illegal; that complainant made the

shipments as described and paid and bore the charges thereon; that it has been damaged in the amount of the charges found herein to have been illegally collected; and that it is entitled to reparation, with interest. Complainant should comply with Rule V of the Rules of Practice.

66 I. C. C.

Filed March 20, 1923.

CHAS. J. ALLISON, Clerk.

MARSHAL'S RETURN.

I have executed the within writ on the Ala. Great Southern Railroad Co. by handing a copy thereof to L. Cowan, Agent of said Ala. Great Southern Railroad. On the Mobile & Ohio Railroad Co. by handing a copy thereof to L. Cowan, Agent of said Mobile & Ohio Railroad Co. at Birmingham, Ala. On James C. Davis, Director-General of Railroads, etc., for the Ala. Great Southern Railroad Co. and the Mobile & Ohio Railroad Co. by handing a copy thereof, for each of said Railroads to L. Cowan, Agent for each of said Railroads at Birmingham, Ala.

This the 21st day of March, 1923.

THOS. J. KENNEMER, U. S. Marshal.

By T. J. BROWN, Deputy.

DEMURRER OF DEFENDANTS, DIRECTOR GENERAL OF RAILROADS.

Filed September 17, 1923.

CHAS. J. ALLISON, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

No. 2879.

KRAUSS BROTHERS LUMBER COMPANY, A CORPORATION, Plaintiff,

vs.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT UNDER AND BY VIRTUE OF SECTION 206, TRANSPORTATION ACT OF 1920, ET ALS, Defendants.

Comes the defendant, James C. Davis, Director General of Railroads, as Agent under Section 206, Transportation Act, 1920, and for himself alone, demurs to the complaint as filed herein, and to each count thereof, separately and severally, and as grounds of such demurrer, sets out the following, separately and severally:

1. For that said count states no cause of action against this defendant.

2. For that said count claims interest against this defendant, when the Court judicially knows that this defendant is acting as the representative of the United States Government, and therefore, is not liable for such interest.

3. For that said count claims an attorney's fee against this defendant, when the Court judicially knows that this defendant is acting as the Agent of the United States Government, and is not liable for such attorney's fee.

4. For that said Count contains a misjoinder of parties defendant, in that this defendant is joined with certain railroad corporations, when the Court judicially knows that said railroads and this defendant cannot be jointly liable for any amount.

STOKELY, SCRIVNER, DOMINICK & SMITH
Attorneys for the above named defendant, Jas. C. Davis, Director General of Railroads, as Agent under Section 206, Transportation Act, 1920.

AMENDMENT TO COMPLAINT

Filed March 27, 1926.

W. S. Lovell, Clerk.

IN THE DISTRICT COURT OF UNITED STATES IN AND FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT under and by virtue of Section 206, Transportation Act of 1920, MOBILE & OHIO RAILROAD COMPANY, a Corporation, and ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a Corporation, Defendants.

Comes the plaintiff, and by leave of the court first had and obtained, amends its complaint heretofore filed in this cause by adding thereto Counts Fourt, Five, Six, Seven and Eight, in words and figures as follows:

COUNT FOUR.

Plaintiff claims of the defendants the sum of TEN THOUSAND THREE HUNDRED FIFTY-SIX DOLLARS ($10,356.00) in the amounts hereinafter set out opposite their respective names, with interest thereon, received by the defendants to the use of the plaintiff,

which sums of money with interest thereon are still due and unpaid. Said sum of $10,356.00 is due from the defendants in the sums set opposite their respective names as follows:

Defendants	*Amounts*	*With Interest From*
James C. Davis, Director General of Railroads, as Agent	$2,894.00	June 1, 1918
Mobile & Ohio Railroad Company, and James C. Davis, Director General of Railroads, as Agent	4,530.00	July 1, 1918
Alabama Great Southern Railroad, and James C. Davis, Director General of Railroads, as Agent	2,932.00	March 20, 1918

The plaintiff also claims of the defendants a reasonable fee for its attorney, as provided by statute. The plaintiff's claim is based upon facts which are more particularly set out in those certain reports and orders of the Interstate Commerce Commission, full, true and correct copies of which are attached hereto and made a part of this count as if fully set out herein, said reports and orders being identified as follows:

EXHIBIT 1.

Report of the Interstate Commerce Commission, dated March 2nd, 1922.

EXHIBIT 2.

An order of the Interstate Commerce Commission, dated November 13th, 1922.

EXHIBIT 3.

An order of the Interstate Commerce Commission, dated April 9th, 1923.

EXHIBIT 4.

An order of the Interstate Commerce Commission, dated May 8th, 1923.

EXHIBIT 5.

Supplementary report, together with order of the Interstate Commerce Commission, both of which are dated October 7th, 1924.

The plaintiff further shows that it is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. The defendants are, and each of them is, a common carrier engaged in Interstate Commerce, maintaining offices and operating railroads, the lines of which run into, within and through the Northern District of Alabama, and each of said defendant carriers is subject to the Act to Regulate Commerce, approved February 4th, 1887, and the several acts amendatory and supplemental thereto. The defendants, as railroad common carriers, engaged in Interstate Commerce and subject to the Interstate Commerce Act, unlawfully collected demurrage and reconsignment charges on carload shipments of lumber shipped between November 1st, 1917, and January 12th, 1918, originally billed to Meridian, Mississippi, Jackson, Tennessee, and Chattanooga, Tennessee, and reconsigned at those points to numerous destinations north and east thereof to other states. Plaintiff seeks recovery herein of said unlawful charges wrongfully exacted of it as aforestated.

The foregoing orders of the Commission referred to as Exhibits, Two, Three and Four, and also the order of the Commission dated October 7th, 1924, referred to in Exhibit Five, were filed forthwith with the defendants.

COUNT FIVE.

Plaintiff is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. The defendants are common carriers engaged in Interstate Commerce, maintaining offices and operating railroads, the lines of which run into, within and through the Northern District of Alabama, and each of said defendant carriers is subject to the Act "To Regulate Commerce, approved February 4th, 1887," and the several acts amendatory and supplemental thereto. The plaintiff avers that the defendants unlawfully collected demurrage and reconsignment charges on car load shipments of lumber shipped between November 1st, 1917, and January 12th, 1918, originally billed to Meridian, Mississippi, Jackson, Tennessee, and Chattanooga, Tennessee, and reconsigned at those points to numerous destinations to states north and east thereof.

The lumber in question was loaded at the mill with which the complainant had contracts, located at various points in Mississippi, Alabama, Louisiana and Texas. The shipments moved to Meridian, Mississippi, and Jackson, Tennessee, over the Mobile & Ohio Railroad; to Chattanooga, Tennessee, over the Alabama Great Southern. These shipments were placed in transit before being sold, and the plaintiff did not know the ultimate destination at the time they were started in shipment.

Prior to the arrival at a later date, at the reconsigning points above enumerated, the lumber was sold to purchasers at points in Pennsylvania, Kentucky, New Jersey, West Virginia, Ohio, Indiana, and New York, and orders were transmitted to the defendants, directing reconsignment to the latter points. These orders defendants refused to accept or failed to comply with immediately, because embargoes were in effect against the points of destination from the original points of shipment and reconsignment points when the shipments originated. Demurrage and reconsignment charges were assessed against the defendants by the plaintiff under such circumstances. The embargoes were brought about by severe congestion of traffic throughout the eastern portion of the United States during the period in question, and were constantly being modified, cancelled or restored to meet particular emergencies.

The plaintiff caused to be filed with the Interstate Commerce Commission within the time allowed by law a formal complaint, No. 11,881, against the above named defendant common carriers, praying for reparation on account of the aforesaid illegal charges.

After a full hearing and investigation, the Interstate Commerce Commission on or about March 2nd, 1922, found that the aforesaid charges were illegal, and made a formal report to that effect, dated March 2nd, 1922, a copy of which said report is attached hereto and made a part hereof as if fully set out herein, and identified as Exhibit 1.

Thereafter, on or about November 13th, 1922, the Interstate Commerce Commission entered its formal

order based upon the finding of March 2nd, 1922, a copy of which order is attached hereto and made a part hereof as if fully set out herein, and identified as Exhibit 2.

Thereafter, on to-wit: April 9th, 1923, the Interstate Commerce Commission entered an order, amending the order of November 13th, 1922, hereinabove referred to, by eliminating from the effect of said order the Alabama Great Southern Railroad Company as a defendant. A copy of said order of April 9th, 1923, is attached hereto and made a part hereof as if fully set out herein, and identified as Exhibit 3.

Thereafter, on to-wit: May 8th, 1923, the Interstate Commerce Commission further amended the order of November 13th, 1922, as amended, by striking out the award of reparation against James C. Davis, Director General of Railroads, as agent, in the sum of $2,932.00, and in said order of May 8th, 1923, the said Commission undertook to re-open the prceedings in said cause, solely for the purpose of determining against whom, if any one, the award of reparation in the amount of $2,932.00 should be made. A copy of said order of May 8th, 1923, is hereto attached and made a part hereof as if fully set out herein, and identified as Exhibit 4.

In pursuance of said order of May 8th, 1923, the Interstate Commerce Commission undertook upon further hearing in said cause to render a supplemental report dated October 7th, 1924, a copy of which report together with the order thereon, as entered by the Interstate Commerce Commission, is attached hereto and made a part hereof as if fully set out herein, and identified as Exhibit 5.

The plaintiff avers that after the Interstate Commerce Commission had rendered its report of March 2nd, 1922, and entered its order thereon as of November 13th, 1922, as hereinabove mentioned, and within one year thereafter the plaintiff filed this suit in the District Court of the United States for the Northern District of Alabama, the suit being filed March 20th, 1923, and prior to the amendatory findings and orders of the Interstate Commerce Commission, dated April 8th, 1923, May 8th, 1923, and October 7th, 1924, and identified as Exhibits 3, 4 and 5, respectively, and attached hereto and made a part hereof.

WHEREFORE the plaintiff specifically claims of the defendants the amounts set opposite their respective names, with interest thereon from the dates shown.

Defendants	*Amounts*	*With Interest From*
James C. Davis, Director General of Railroads, as Agent	$2,894.00	June 1, 1918
Mobile & Ohio Railroad Company and James C. Davis, Director General of Railroads, as Agent	4,530.00	July 1, 1918
Alabama Great Southern Railroad, and James C. Davis, Director General of Railroads, as Agent	2,932.00	March 20, 1918

The plaintiff also claims of the defendants a reasonable attorney's fee, as provided by statute.

COUNT SIX.

The plaintiff claims of the defendants TWO THOUSAND EIGHT HUNDRED NINETY-FOUR AND NO-100 DOLLARS ($2,894.00) for money on the 1st day of June, 1918, received by the defendants to the use of the plaintiff, which sum of money with interest thereon at the rate of six per cent per annum is still unpaid. The plaintiff also claims of the defendants a reasonable fee for its attorney, as provided by statute.

The plaintiff's claim is based upon the facts which are more particularly set out in those certain reports and orders of the Interstate Commerce Commission, full, true and correct copies of which are attached hereto and made a part of this count as if fully set out herein, said reports and orders being identified as follows:

EXHIBIT 1.

Report of the Interstate Commerce Commission, dated March 2nd, 1922.

EXHIBIT 2.

An order of the Interstate Commerce Commission, dated November 13th, 1922.

EXHIBIT 3.

An order of the Interstate Commerce Commission, dated April 9th, 1923.

EXHIBIT 4.

An order of the Interstate Commerce Commission, dated May 8th, 1923.

EXHIBIT 5.

Supplementary report, together with order of the Interstate Commerce Commission, both of which are dated October 7th, 1924.

The plaintiff further shows that it is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. The defendants are, and each of them is, a common carrier engaged in Interstate Commerce, maintaining offices and operating railroads, the lines of which run into, within and through the Northern District of Alabama, and each of said defendant carriers is subject to the Act "To Regulate Commerce," approved February 4th, 1887, and the several acts amendatory and supplementary thereto. The defendants, as railroad common carriers, engaged in Interstate Commerce and subject to the Interstate Commerce Act, unlawfully collected demurrage and reconsignment charges on carload shipments of lumber shipped between November 1st, 1917, and January 12th, 1918, originally billed to Meridian, Mississippi, Jackson, Tennessee, and Chattanooga, Tennessee, and reconsigned at those points to numerous destinations north and east thereof to other states. Plaintiff seeks recovery herein of said unlawful charges wrongfully exacted of it as aforestated.

COUNT SEVEN.

The plaintiff claims of the defendants FOUR THOUSAND FIVE HUNDRED THIRTY AND NO/100 DOLLARS ($4,530.00) for money on the 1st day of July, 1918, received by the defendants to the use

of the plaintiff, which sum of money with interest thereon at the rate of six per cent per annum is still unpaid. The plaintiff also claims of the defendants a reasonable fee for its attorney, as provided by statute.

The plaintiff's claim is based upon the facts which are more particularly set out in those certain reports and orders of the Interstate Commerce Commission, full, true and correct copies of which are attached hereto and made a part of this count as if fully set out herein, said reports and orders being identified as follows:

EXHIBIT 1.

Report of the Interstate Commerce Commission, dated March 2nd, 1922.

EXHIBIT 2.

An order of the Interstate Commerce Commission, dated November 13th, 1922.

EXHIBIT 3.

An order of the Interstate Commerce Commission, dated April 9th, 1923.

EXHIBIT 4.

An order of the Interstate Commerce Commission, dated May 8th, 1923.

EXHIBIT 5.

Supplementary report, together with order of the Interstate Commerce Commission, both of which are dated October 7th, 1924.

The plaintiff further shows that it is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. The defendants are, and each of them is, a common carrier engaged in Interstate Commerce, maintaining offices and operating railroads, the lines of which run into, within and through the Northern District of Alabama, and each of said defendant carriers is subject to the Act "To Regulate Commerce, approved February 4th, 1887," and the several acts amendatory and supplemental thereto. The defendants, as railroad common carriers, engaged in Interstate Commerce and subject to the Interstate Commerce Act, unlawfully collected demurrage and reconsignment charges on carload shipments of lumber shipped between November 1st, 1917, and January 12th, 1918, originally billed to Meridian, Mississippi, Jackson, Tennessee, and Chattanooga, Tennessee, and reconsigned at those points, to numerous destinations north and east thereof to other states. Plaintiff seeks recovery herein of said unlawful charges wrongfully exacted of it as aforestated.

COUNT EIGHT.

The plaintiff claims of the defendants TWO THOUSAND NINE HUNDRED THIRTY-TWO AND NO/100 DOLLARS ($2,932.00) for money on the 20th day of March, 1918, received by the defendants to the use of the plaintiff, which sum of money with interest thereon at the rate of six per cent per annum is still unpaid. The plaintiff also claims of the defendants a reasonable fee for its attorney, as provided by statute.

The plaintiff claims is based upon the facts which are more particularly set out in those certain reports and

orders of the Interstate Commerce Commission, full, true and correct copies of which are attached hereto and made a part of this count as if fully set out herein, said reports and orders being identified as follows:

EXHIBIT 1.

Report of the Interstate Commerce Commission, dated March 2nd, 1922.

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EXHIBIT 3.

An order of the Interstate Commerce Commission, dated April 9th, 1923.

EXHIBIT 4.

An order of the Interstate Commerce Commission, dated May 8th, 1923.

EXHIBIT 5.

Supplementary report, together with order of the Interstate Commerce Commission, both of which are dated October 7th, 1924.

The plaintiff further shows that it is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. The defendants are, and each of them is, a common carrier engaged in Interstate Commerce, maintaining offices and operating railroads, the lines of which run into, within and through the Northern District of Alabama, and each of said defen-

dants carriers is subject to the Act "To Regulate Commerce, approved February 4th, 1887," and the several acts amendatory and supplemental thereto. The defendants, as railroad common carriers, engaged in Interstate Commerce and subject to the Interstate Commerce Act, unlawfully collected demurrage and reconsignment charges on carload shipments of lumber shipped between November 1st, 1917, and January 12th, 1918, originally billed to Meridian, Mississippi, Jackson, Tennessee, and Chattanooga, Tennessee, and reconsigned at those points to numerous destinations north and east thereof to other states. Plaintiff seeks recovery herein of said unlawful charges wrongfully exacted of it as aforestated.

J. P. MUDD,
Attorney for Plaintiff.

EXHIBIT 1.

No. 11881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISISSIPPI RAILROAD COMPANY, ET AL.

Submitted Nov. 22, 1921. Decided March 2, 1922.

Demurrage and reconsignment charges assessed on carload shipments of lumber reconsigned at Meridian, Miss., Jackson and Chattanooga, Tenn., found illegal. Reparation awarded.

Harry S. Elkins and Ross H. Johnson for complainant.
H. L. Walker, Alex M. Bull, and John F. Finerty for Director General of Railroads.
H. L. Walker for Mobile & Ohio Railroad Company.

REPORT OF THE COMMISSION.

Division 2, Commissioners Daniels, Esch and Campbell. By Division 2:

Exceptions were filed by the complainant and by the Director General of Railroads, as Agent, to the report proposed by the examiner, and the issues were orally argued.

Complainant is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. It alleges that defendants unlawfully collected demurrage and reconsignment charges on carload shipments of lumber, shipped between November 1st, 1917, and January 12th, 1918, originally billed to Meridian, Miss., Jackson, and Chattanooga, Tenn., and reconsigned at those points to numerous destinations north and east thereof. Reparation only is sought.

The lumber was loaded at mills with which complainant had contracts, located at various points in Mississippi, Alabama, Louisiana and Texas. The shipments moved into Meridian and Jackson over the Mobile & Ohio and into Chattanooga over the Alabama Great Southern. Most of them were placed in transit before being sold, so that complainant did not know the ultimate destination at the time they were started. Prior or subsequent to arrival at the reconsigning points the lumber was sold to purchasers at points in Pennsylvania, Kentucky, New Jersey, West Virginia, Ohio, Indiana, and New York, and orders were transmitted to defendants directing reconsignment to the latter points. These orders defendants either refused to accept or in any event to comply with immediately, because embargoes were in effect against the points of destination from the original points of shipment, and from the reconsigning points when the shipments originated. Demurrage was assessed for the resulting detention of the cars. In some instances reconsignment charges also were collected, which defendants admit was done without tariff authority. Some of the lumber was unloaded and stored at the reconsigning points, but most of the shipments were held in the cars

and moved to destinations as the embargoes were lifted from time to time. These embargoes were brought about by severe congestion of traffic throughout the east during the period in question and were constantly being modified, cancelled, and restored to meet particular emergencies.

Complainant does not question the reasonableness or necessity of the embargoes, but contends that as defendants' tariffs contained no provision against reconsignment to an embargoed point, detention of the cars was due to defendants' inability to fulfill the obligations imposed by the tariffs, and that the charges were therefore illegal. On January 13, 1918, rules became effective prohibiting reconsignment when in conflict with embargoes.

Defendants insist that complainant knew before the shipments were tendered that embargoes were in effect throughout the territory in question, and as shipments could not have been made either from the original points or locally from the points of reconsignment, billing of the shipments to the latter points was for the purpose of evading and nullifying the embargoes. Complainant admits that it knew that embargoes were in effect generally throughout the territory in question, but states that since the final destinations were not known at the time shipments were started it could have had no knowledge that they were under embargo. It had been complainant's practice for years to reconsign at these same points, and it disclaims any intention on its part to evade the embargoes.

We have repeatedly held that when tariffs contain no restriction against reconsignment to embargoes points, demurrage charges may not be assessed for the car detention resulting therefrom. Reconsignment Case, 47 I. C. C. 590, 634; Wood v. N. Y. P. & N. R. R. Co., 53 I. C. C. 183; Atlantic Lumber Co. v. N. Y. P. & N. R. R. Co., 57 I. C. C. 129.

Defendants admit that demurrage should not be assessed if the final destinations were not under embargo when the shipments left the point of origin, but contend that if the points of final destination were under embargo at the time the shipments started and at the time of reconsignment the carriers are no more required to reconsign to such points than to accept the shipments at the points of origin. They argue that since the right of reconsignment attaches as of the date of shipment, even if the order be given subsequently, and since there was no obligation to accept the shipments at points of origin on account of the embargoes, there was likewise no obligation to reconsign. The obligation to accept articles tendered for transportation is governed by general principles of law, while the obligation to reconsign is determined by rules lawfully on file with us. The right to refuse shipments temporarily for good cause by the establishment of embargoes, which are not required to be filed with us, is recognized. The right to reconsign depends entirely upon the construction of rules, which are required to be filed in the same manner as rates, and if the carriers do not restrict such rules to the extent of their capacity to perform the service, the shipper can not be held liable for the detention of cars when it is not directly respon-

sible for such detention and can not abate the cause thereof, as in the case of an embargo, which is a disability of the carrier.

We find that the demurrage and reconsignment charges assailed were illegal; that complainant made the shipments as described and paid and bore the charges thereon; that it has been damaged in the amount of the charges found herein to have been illegally collected; and that it is entitled to reparation, with interest. Complainant should comply with Rule V of the Rules of Practice.

66 I. C. C.

EXHIBIT 2.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of November, A. D., 1922.

No. 11881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

No. 11,881. (Sub. No. 1.)

SAME

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA, TENNESSEE & NORTHERN RAILROAD CORPORATION, ET AL.

It appearing, That on March 2nd, 1922, the commission entered its report in the above-entitled proceedings, which is hereby referred to and made a part hereof, and these proceedings now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question we find that complainant is entitled to awards of reparation from the defendants named in

the following table in the amounts set opposite their respective names, with interest:

Defendants	*Amounts*	*With Interest From*
James C. Davis, Director General of Railroads, as Agent	$2,894.00	June 1, 1918
Mobile & Ohio Railroad Company, and James C. Davis, Director General of Railroads, as Agent	4,530.00	July 1, 1918
Alabama Great Southern Railroad, and James C. Davis, Director General of Railroads, as Agent	2,932.00	March 20, 1918

It is therefore ordered, That the defendants named in the above table be, and they are hereby, authorized and directed to pay unto complainant, Krauss Brothers Lumber Company, on or before December 28th, 1922, the amounts set opposite their respective names in said table, with interest hereon at the rate of 6 per cent per annum from the dates therein set forth, as reparation on account of illegal demurrage and reconsignment charges assessed on numerous carload shipments of lumber reconsigned at Meridian, Miss., Jackson and Chattanooga, Tenn.

By the Commission.

GEORGE B. MCGINTY,
Secretary.

(SEAL)

EXHIBIT 3.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 9th day of April, A. D. 1923.

No. 11881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

No. 11881. (Sub. No. 1.)

SAME

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA, TENNESSEE & NORTHERN RAILROAD CORPORATION, ET AL.

Upon further consideration of the record in the above-entitled proceeding, and good cause appearing therefor:

It is ordered, That the order entered in this proceeding on November 13th, 1922, authorizing the payment of reparation, be, and it is hereby, amended by eliminating therefrom the Alabama Great Southern Railroad Company as a defendant.

By the Commission.

GEORGE B. MCGINTY,
Secretary.

(SEAL)

EXHIBIT 4.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 8th day of May, A. D. 1923.

No. 11881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

No. 11881 Sub. No. 1.

SAME.

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA, TENNESSEE & NORTHERN RAILROAD CORPORATION, ET AL.

Upon further consideration of the record in the above-entitled proceeding, and good cause appearing therefor:

It is ordered, that the order entered in this proceeding on November 13th, 1922, as amended by order entered April 9th, 1923, be, and it is hereby, further amended by striking out the award of reparation against James C. Davis, Director General of Railroads, as agent, in the sum of $2,932.00.

It is further ordered, That this proceeding be, and it is hereby, reopened for such further hearing as the

Commission may hereafter direct, solely for the purpose of determining against whom the award of reparation, above referred to, should run and in what amounts.

By the Commission.

GEORGE B. McGINTY,
Secretary.

(SEAL)

A True Copy
(Signed) GEORGE B. McGINTY,
Secretary.

EXHIBIT 5.

INTERSTATE COMMERCE COMMISSION,

No. 11881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

Submitted October 30th, 1923. Decided October 7, 1924

Upon further hearing amended order further modified as to amount of reparation awarded. Original report 66 I. C. C. 637.

Johnson & Elkins and *Harry S. Elkins* for complainant.

John F. Finerty and *Alex M. Bull* for Director General of Railroads, as agent.

REPORT OF THE COMMISSION ON FURTHER HEARING BY THE COMMISSION.

In our original report, 66 I. C. C. 637, we found that demurrage and reconsignment charges assessed on certain carload shipments of lumber reconsigned at Meridian, Miss., and Jackson and Chattanooga, Tenn., were illegal. The original order of reparation contained an item of $2,932 which the Alabama Great Southern and the Director General of Railroads, as Agent, were directed to pay to complainant with interest from March 20th, 1918. This amount of reparation was found due upon 30 carload shipments reconsigned at Chattanooga and was covered by the complaint in No. 11,881 (Sub. No. 1). After the order had been issued attention was directed to the fact that although the Alabama Great Southern was mentioned in the body of the complaint it was not made a party defendant, and had not been served. Accordingly the order was amended so as to eliminate this item therefrom and a further hearing was had solely for the purpose of determining against whom the award of reparation, above referred to, should run and in what amounts.

The 30 carloads were shipped during the period from October 24th to December 27th, 1917. Demurrage in the amount of $2,747 on 29 cars was collected for detentions which occurred prior to Federal control, and $180.00 on one car for detention during Federal control. A reconsignment charge of $5.00 was also collected on this car. All of the shipments were delivered and all the charges were collected by the Director General of Railroad during Federal control. The demurrage and recon-

signment charges of $185.00 collected on the one shipment accrued to the Director General of Railroads and he clearly became liable therefor. The demurrage charges on the other 29 shipments were credited to the Alabama Great Southern. The real question for determination concerns these shipments, and is: Should the Director General of Railroad, as Agent, hereinafter called defendant be required to refund charges illegally collected by the Director General of Railroads after January 1, 1918, for detention prior to Federal control of cars containing shipments subsequently transported in part and delivered by him.

The liability of defendant in actions arising out of Federal control are set forth in Section 206 of the transportation act, 1920, which provides in part:

> (c) Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President, during the period of Federal control of * * * charges, * * *, which were * * * * in violation of the Interstate Commerce Act, may be filed with the Commission, * * * * against the agent designated by the President under subdivision (a), naming in the petition the railroad or system of transportation against whom such complaint would have been brought if such railroad or system had not been under Federal control at the time the matter complained of took place. X X X X X X.

If there is any authority for the award of reparation against defendant it must be found in this provision.

In reference thereto we said in *Terre Haute, Indianapolis & E. T. Co.* v. *Director General,* 77 I. C. C. 658:

> We believe that this provision was intended to cover charges collected for services performed, at least in part, by the director general during Federal control, and that complaints regarding charges collected by the director general, as agent for the carriers, on account of services performed wholly prior to Federal control, should be filed against the carriers themselves. * * * * Our consideration of the complaint will therefore be confined to shipments which were delivered and on which the charges were paid on or subsequent to January 1, 1918.

In that case transportation charges were in issue. In this case in so far as it concerns the shipments which were detained prior to Federal control, demurrage charges are to be considered. Complainant seeks to base defendant's liability on the mere collection of illegal charges during Federal control. It urges that no right of action accrued until the illegal charges were collected and that the damage was inflicted by the Director General of Railroad. It contends also that the demurrage charges were incidental to the through transportation and that as the Director General of Railroads has completed the transportation service the defendant is liable for illegal demurrage collected on the shipments just as much as he would be for the collection of illegal transportation charges.

But demurrage charges are no part of the rate or through charge in effect at the time the shipment is for-

warded from point of origin. *Getz Brothers & Company v. Director General,* 85 I. C. C. 673. Although they may follow the shipment and be collected together with the transportation charges, they are for a distinct and separate service. The Director General of Railroads performed no part of the service on the 29 carloads for which the demurrage was collected and in the collection thereof he was acting solely as agent for the corporate carrier. Practically the same situation is presented as in *Terre Haute, Indianapolis & E. T. Co. v. Director General, supra.*

We find that defendant is not liable for the collection of illegal demurrage charges on the 29 shipments as to which the periods of detention were entirely prior to Federal control, but that he is liable for the collection of illegal demurrage charges on the one remaining shipment. The order will be modified accordingly.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., on the 7th day of October, 1924.

No. 11881.

KRAUSS BROTHERS LUMBER COMPANY

v.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT; ALABAMA & MISSISSIPPI RAILROAD COMPANY; THE BAL-

TIMORE & OHIO RAILROAD COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE LONG ISLAND RAILROAD COMPANY; MOBILE & OHIO RAILROAD COMPANY; NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILROAD COMPANY; AND PHILADELPHIA & READING RAILWAY COMPANY.

No. 11881. (Sub-No. 1.)

SAME

v.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT; ALABAMA, TENNESSEE & NORTHERN RAILROAD CORPORATION; SHREVEPORT, HOUSTON & GULF RAILROAD COMPANY; AND SOUTH BROOKLYN RAILWAY COMPANY.

It appearing, That on March 2, 1922, the commission entered its report and on November 13th, 1922, its order awarding reparation in the above entitled proceedings;

It further appearing, That on April 9 and May 8, 1923, the commission entered its orders amending the said order of November 13th, 1922, and reopened the

proceedings for further hearing, which has been had, and the commission having, on the date hereof, made and filed a report on further hearing, which said report on further hearing is hereby referred to and made a part hereof;

It is ordered, That defendant James C. Davis, Director General of Railroads, as Agent, be, and he is hereby, authorized and directed to pay unto complainant, Krauss Brothers Lumber Company, on or before December 1, 1924, the sum of $185.00 with interest thereon at the rate of six per cent per annum from March 30th, 1918, on account of illegal demurrage and reconsignment charges collected on a carload of lumber reconsigned at Chattanooga, Tenn.

By the Commission.

GEORGE B. MCGINTY,
Secretary.

(SEAL)

ORDER ALLOWING AMENDMENT

SATURDAY, MARCH 27TH, 1926

In open Court, Honorable W. I. Grubb, Presiding

2879 KRAUSS BROS. LUMBER COMPANY, A CORPORATION,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT, UNDER AND BY VIRTUE OF SECTION 206 OF TRANSPORTATION ACT OF 1920; MOBILE & OHIO RAILROAD COMPANY, A CORPORATION, AND ALABAMA GREAT SOUTHERN RAILROAD COMPANY, A CORPORATION.

This cause coming on to be heard, this day, come the parties herein by counsel, and in person, and plaintiff by leave of the court first had and obtained amends complaint by adding Counts 4, 5, 6, 7 and 8, by separate paper this day filed.

Thereupon the defendant pleads in short by consent the general issue with leave to give in evidence any matter which, if well pleaded, would be admissible in defense of the action, to have effect as if so pleaded; with leave to the plaintiff to give in evidence any matter which, if well pleaded, would be admissible in reply to such defensive matter to have effect as if so pleaded.

Thereupon by agreement of counsel, it is ordered by the court that this cause be and is hereby continued.

AMENDMENT TO COMPLAINT SUBSTITUTING ANDREW W. MELLON FOR JAMES C. DAVIS, AS DIRECTOR GENERAL

Filed March 27, 1926
W. S. Lovell, Clerk

IN THE DISTRICT COURT OF UNITED STATES IN AND FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT, under and by virtue of Section 206, Transportation Act of 1920, MOBILE & OHIO RAILROAD COMPANY, a Corporation, and ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a Corporation, Defendants.

Comes the plaintiff in the above styled cause, and by leave of court first had and obtained, amends its complaint by substituting "Andrew W. Mellon, as Agent" as party defendant in the name, place and stead of "James C. Davis, as Agent," and wherever claim is made against the said James C. Davis, as Agent, the same shall be amended so as to read against the said Andrew W. Mellon, as Agent.

J. P. Mudd,
Attorney for Plaintiff.

ORDER ALLOWING

SATURDAY, MARCH 27TH, 1926

In Open Court, Honorable W. I. Grubb, Presiding

No. 2879.

KRAUSS BROS. LUMBER COMPANY, A CORPORATION,

vs.

JAMES G. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT, ETC.

This cause coming on to be heard, this day, come the parties herein by counsel and in person, and upon plaintiff's motion and by leave of the court first had and obtained plaintiff amends complaint by substituting "Andrew Mellon as Agent" as party defendant in the name, place and stead of James G. Davis as Agent, "And wherever claim is made against the said James G. Davis, as agent, the same is hereby amended so as to read against the said Andrew W. Mellon as Agent, as appears by separate paper this day filed."

DEMURRER OF DEFENDANTS, MOBILE & OHIO RAILROAD CO. AND ALABAMA GREAT SOUTHERN RAILROAD CO.

Filed May 1, 1926
W. S. Lovell, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

No. 2879

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

JAMES C. DAVIS, Director General of Railroads, as Agent under and by virtue of Section 206, Transportation Act of 1920, MOBILE & OHIO RAILROAD COMPANY, a Corporation, and ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a Corporation, Defendants.

Comes the defendants, Mobile & Ohio Railroad Company, a corporation, and Alabama Great Southern Railroad Company, a corporation, separately and severally, and each for itself alone demurs to the complaint as filed herein, and as grounds for such demurrer assigns the following, separately and severally, to-wit:

1. For that said complaint states no cause of action against this defendant.

2. For that the court judicially knows that this defendant and the Director General of Railroads were not operating as common carriers at one and the same time, and that therefore this defendant cannot be jointly liable to the plaintiff as alleged in said complaint.

3. For that construing the complaint, and the exhibit thereto, most strongly against the plaintiff, it affirmatively appears that the said award sued on was not against this defendant in any amount.

4. For that construing the complaint and the exhibit thereto, most strongly against the plaintiff, it affirmatively appears that the said award here sued on was against the Director General of Railroads for the operation of this defendant's line of railroad, and not against this defendant in any amount.

5. For that said complaint contains a misjoinder of parties defendant.

6. For that said complaint contains a misjoinder of parties defendant in that this defendant is sued jointly with the Director General of Railroads as agent under the Transportation Act of 1920, when the court judicially knows that this defendant cannot be jointly liable with said Agent.

7. For that construing said complaint most strongly against the plaintiff, it affirmatively appears that said charges were collected during the Federal Control of Railroads, and the court knows judicially that this defendant did not collect said charges during said time.

8. For that construing the complaint most strongly against the plaintiff, it affirmatively appears that said

charges accrued while the railroad of this defendant was being operated by the Railroad Administration, and that said overcharges were collected by said Railroad Administration.

STOKELY, SCRIVNER, DOMINICK & SMITH,
and ALEX M. BULL,
Attorneys for the above named Defendants.

COURT RECORD

SATURDAY, MAY 1ST, 1926

The District Court of the United States for the Southern Division of the Northern District of Alabama, met pursuant to adjournment; Present, Honorable W. I. Grubbs, United States District Judge, Northern District of Alabama, presiding; Honorable Charles B. Kennamer, United States Attorney; Thos. J. Kennamer, United States Marshal, and W. S. Lovell, Clerk.

2879 KRAUSS BROTHERS LUMBER COMPANY, A CORPORATION

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT, UNDER AND BY VIRTUE OF SECTION 206 OF THE TRANSPORTATION ACT OF 1920; MOBILE & OHIO RAILROAD COMPANY, A CORPORATION; ALABAMA GREAT SOUTHERN RAILROAD COMPANY, A CORPORATION.

This cause coming on to be heard, this day, comes the parties herein by counsel, and in person, and defendants submit a demurrer to complaint as amended, and said demurrer being heard, considered and understood by the court, it is ordered, adjudged and decreed by the court that said demurrer be and is hereby overruled and denied.

Thereupon issue being joined on plaintiff's complaint as amended and defendants plea of general issue pleaded in short by consent, with leave to give in evidence any matter which, if well pleaded, would be admissible in defense of the action, to have effect as if so pleaded, and with leave to the plaintiff to give in evidence any matter which, if well pleaded, would be admissible in repyl to such defensive matter, to have effect as if so pleaded; to try this cause comes a jury of good and lawful men, to-wit: L. E. Garrett and eleven others duly empanelled, tried and sworn and the trial of this cause is begun.

After the introduction of the evidence, the argument of counsel, the oral charge delivered by the court, the jury returned in open court the following verdict which was read by the clerk of this court, to-wit: "We the jury find the issue in favor of the defendants. L. E. Garrett, Foreman."

Thereupon, it is ordered, adjudged and decreed by the court that said defendants go hence without day in respect to this cause, and that the plaintiff be taxed with all costs in this behalf expended for which costs an execution may issue.

BILL OF EXCEPTIONS

Filed August 19th, 1926

W. S. Lovell, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

No. 2879.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

ANDREW W. MELLON, Director General of Railroads, as agent, under and by virtue of Section 206, Transportation Act of 1920, Mobile & Ohio Railroad Company, a corporation, and Alabama Great Southern Railroad Company, a corporation, Defendants.

BE IT UNDERSTOOD that in the trial of this cause on the 1st day of May, 1926, the Honorable Wm. I. Grubb presiding and both parties appearing by counsel, a jury was duly empaneled and the following proceedings had:

Mr. Mudd, Attorney for Plaintiff: Your Honor, we wish to offer in evidence Exhibits 1, 2, 3, 4, 5 and 6,

respectively, and do now introduce them and each of them in evidence, said exhibits being as follows:

Exhibit No. 1 is an order of the Interstate Commerce Commission, dated March 2nd, 1922, in case No. 11881, Krauss Brothers Lumber Company vs. Director General, as agent, Alabama & Mississippi Railroad Company, et al. Exhibit No. 1 is hereinafter set out in full and made a part of this bill of exceptions.

Exhibit No. 2 is a duly certified copy of an order of the General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of November, 1922, in case No. 11881, Krauss Brothers Lumber Company vs. Director General, as agent, Alabama & Mississippi Railroad Company, et al. Exhibit No. 2 is hereinafter set out in full, and made a part of this bill of exceptions.

Exhibit No. 3 is an order of the Interstate Commerce Commission, dated April 9th, 1923, in the case of Krauss Brothers Lumber Company vs. Director General, as agent, Alabama & Mississippi Railroad Company. Exhibit No. 3 is hereinafter set out in full and made a part of this bill of exceptions.

Exhibit No. 4 is an order of the Interstate Commerce Commission, dated May 8th, 1923, in said above mentioned case. Exhibit No. 4 is hereinafter set out in full and made a part of this bill of exceptions.

Exhibit No. 5 is a supplemental report by the Interstate Commerce Commission, together with an order of said commission, dated October 7th, 1924, and referring to the said hereinabove mentioned case. Exhibit No. 5 is hereinafter set out in full and made a part of this bill of exceptions.

Exhibit No. 6 is a true and correct copy of Interstate Commerce Commission Supplemental Rule Five, showing the certification of charges by the defendant carriers to the Interstate Commerce Commission, from which amount reparation awards were computed.

It is admitted by the parties to this cause, subject to exception on the part of the plaintiff on the ground that the evidence is illegal; irrelevant and incompetent, that of the amount awarded by the Interstate Commerce Commission against the Director General, as agent, and the Mobile & Ohio Railroad Company (the same being the second item of its award in case No. 11,881), the said Mobile & Ohio Railroad Company received and retained only $245.00, and all of said $245.00 being demurrage charges, and none thereof being for any reconsignment charge. The plaintiff especially objects to the admissibility of such evidence on the ground that the same is immaterial, illegal and incompetent. The court overrules said objection, and the plaintiff excepts.

It is also agreed by the parties that no portion of the awards made by the Interstate Commerce Commission in favor of the plaintiff and against the defendants, as shown by the order of November 13th, 1922, and identified as Exhibit No. 2, post, has been paid.

DEFENDANTS' TESTIMONY.

Mr. Bull for the defendants:

I want to offer as defendants' Exhibit No. 7 the the pleadings before the Interstate Commerce Commission, and as Exhibit No. 8 the testimony and all of the exhibits taken and filed before the Interstate Commerce Commisison at the hearing on January 10th, 1921, which is the hearing upon which the original order was based; and as Exhibit No. 9 I want to file a copy of the Director General's petition for a reargument or reconsideration, and the order denying that. As Exhibit 10 I am going to file the correspondence which led up to the second order of the Commission, eliminating the Alabama Great Southern Railroad. There are attached to these letters the orders themselves. As Exhibit No. 11 I wish to offer the testimony and exhibits offered at the hearing when the Interstate Commerce Commission re-opened the case to determine how much was due from the Alabama Great Southern Railroad Company. I will offer as Exhibit No. 12 an affidavit of Mr. Tracey as to the division and accounting between the Alabama Great Southern Railroad Company and the Director General.

The plaintiff objected to the introduction of all the foregoing exhibits, separately and severally, Exhibit No. 7 to Exhibit No. 12, inclusive, offered by the defendants, on the ground that each of the same were immaterial, irrelevant and incompetent, and on the further ground that they and neither of them have no bearing on the issues of this case, and are an improper attempt to impeach the findings and orders of the Interstate Commerce

Commission. The court overruled the objection, and the plaintiff reserved an exception.

It is admitted by the parties in open court that if any attorney's fee is payable under the law for the institution and prosecution of this suit in the Federal District Court that $1,000.00 will be a reasonable attorney's fee.

The plaintiff's exhibits referred to as Exhibit No. 1, Exhibit No. 2, Exhibit No. 3, Exhibit No. 4, Exhibit No. 5, and the defendants' Exhibit No. 12 are hereinafter set forth fully as a part of this bill of exceptions. By virtue of an order of the Presiding Judge, W. I. Grubb, plaintiff's Exhibit No. 6 and the defendants' exhibits numbers 7, 8, 9, 10 and 11, respectively, are omitted from this bill of exceptions in order that they may be sent by the Clerk of the lower court, in compliance with the said order of the Presiding Judge, direct to the Court of Appeals.

This was all the evidence in the case.

EXHIBIT NO. 1.

No. 11,881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

Submitted Nov. 22, 1921. Decided March 2nd, 1922.

Demurrage and reconsignment charges assessed on carload shipments of lumber reconsigned at Meridian, Miss., Jackson and Chattanooga, Tenn., found illegal. Reparation awarded.

Harry S. Elkins and Ross H. Johnson for complainant; H. L. Walker, Alex M. Bull, and John F. Finerty for Director General of Railroads. H. L. Walker for Mobile & Ohio Railroad Company.

REPORT OF THE COMMISSION.

Division 2, Commissioners Daniels, Esch and Campbell. By Division 2:

Exceptions were filed by the complainant and by the Director General of Railroads, as Agent, to the report proposed by the examiner, and the issues were orally argued.

Complainant is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. It alleges that defendants unlawfully collected demurrage and reconsignment charges on carload shipments of lumber, shipped between November 1st, 1917, and January 12th, 1918, originally billed to Meridian, Miss., Jackson, and Chattanooga, Tenn., and reconsigned at those points to numerous destinations north and east thereof. Reparation only is sought.

The lumber was loaded at mills with which complainant had contracts, located at various points in Mississippi, Alabama, Louisiana and Texas. The shipments moved into Meridian and Jackson over the Mobile & Ohio, and into Chattanooga over the Alabama Great Southern. Most of them were placed in transit before being sold, so that complainant did not know the ultimate destination at the time they were started. Prior or subsequent to arrival at the reconsigning points the lumber was sold to purchasers at points in Pennsylvania, Kentucky, New Jersey, West Virginia, Ohio, Indiana, and New York, and orders were transmitted to defendants directing reconsignment to the latter points. These orders defendants either refused to accept or in any event to comply with immediately, because embargoes were in effect against the points of destination from the original points of shipment, and from the reconsigning points when the shipments originated. Demurrage was assessed for the resulting detention of the cars. In some instances reconsignment charges also were collected, which defendants admit was done without tariff authority. Some of the lumber was unloaded and stored at the reconsigning points, but most of the shipments were held in the cars

and moved to destinations as the embargoes were lifted from time to time. These embargoes were brought about by severe congestion of traffic throughout the east during the period in question and were constantly being modified, cancelled, and restored to meet particular emergencies.

Complainant does not question the reasonableness or necessity of the embargoes, but contends that as defendants' tariffs contained no provision against reconsignment to an embargoed point, detention of the cars was due to defendants' inability to fulfill the obligations imposed by the tariffs, and that the charges were therefore illegal. On January 13th, 1918, rules became effective prohibiting reconsignment when in conflict with embargoes.

Defendants insist that complainant knew before the shipments were tendered that embargoes were in effect throughout the territory in question, and as shipments could not have been made either from the original points or locally from the points of reconsignment, billing of the shipments to the latter points was for the purpose of evading and nullifying the embargoes. Complainant admits that it knew that embargoes were in effect generally throughout the territory in question, but states that since the final destinations were not known at the time shipments were started it could have had no knowledge that they were under embargo. It had been complainant's practice for years to reconsign at these same points, and it disclaims any intention on its part to evade the embargoes.

We have repeatedly held that when tariffs contain no restriction against reconsignment to embargoed points, demurrage charges may not be assessed for the car detention resulting therefrom. Reconsignment case, 47 I. C. C., 590, 634; *Wood v. N. Y. P. & N. R. R. Co.*, 53 I. C. C., 183; *Atlantic Lumber Co. v. N. Y. P. & N. R. R. Co.*, 57 I. C. C., 129.

Defendants admit that demurrage should not be assessed if the final destinations were not under embargo when the shipments left the point of origin, but contend that if the points of final destination were under embargo at the time the shipments started and at the time of reconsignment the carriers are no more required to reconsign to such points than to accept the shipments at the points of origin. They argue that since the right of reconsignment attaches as of the date of shipment, even if the order be given subsequently, and since there was no obligation to accept the shipments at points of origin on account of the embargoes, there was likewise no obligation to reconsign. The obligation to accept articles tendered for transportation is governed by general principles of law, while the obligation to reconsign is determined by rules lawfully on file with us. The right to refuse shipments temporarily for good cause by the establishment of embargoes, which are not required to be filed with us, is recognized. The right to reconsign depends entirely upon the construction of rules, which are required to be filed in the same manner as rates, and if the carriers do not restrict such rules to the extent of their capacity to perform the service, the shipper can not be held liable for the detention and can not abate the cause thereof, as in

the case of an embargo, which is a disability of the carrier.

We find that the demurrage and reconsignment charges assailed were illegal; that complainant made the shipments as described and paid and bore the charges thereon; that it has been damaged in the amount of the charges found herein to have been illegally collected; and that it is entitled to reparation, with interest. Complainant should comply with Rule V of the Rules of Practice.

66 I. C. C., 637.

EXHIBIT NO. 2.

ORDER.

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 13th day of November, A. D., 1922.

No. 11881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

No. 11,881. (Sub. No. 1.)

SAME.

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA, TENNESSEE & NORTHERN RAILROAD CORPORATION, ET AL.

It appearing, That on March 2nd, 1922, the commission entered its report in the above entitled proceedings, which is hereby referred to and made a part hereof, and these proceedings now coming on for further consideration on the question of reparation, and the parties having

filed agreed statements with respect to the shipments in question, we find that complainant is entitled to awards of reparation from the defendants named in the following table in the amounts set opposite their respective names, with interest.

Defendants	*Amounts*	*With Interest From*
James C. Davis, Director General of Railroads, as Agent	$2,894.00	June 1, 1918
Mobile & Ohio Railroad Company, and James C. Davis, Director General of Railroads, as Agent	4,530.00	July 1, 1918
Alabama Great Southern Railroad, and James C. Davis, Director General of Railroads, as Agent	2,932.00	March 20, 1918

It is therefore ordered, That the defendants named in the above table be, and they are hereby, authorized and directed to pay unto complainant, Krauss Brothers Lumber Company, on or before December 28th, 1922, the amounts set opposite their respective names in said table, with interest thereon at the rate of 6 per cent per annum from the dates therein set forth, as reparation on account of illegal demurrage and reconsignment charges assessed on numerous carload shipments of lumber reconsigned at Meridian, Miss., Jackson and Chattanooga, Tenn.

By the Commission.

GEORGE B. MCGINTY,

(SEAL) Secretary.

EXHIBIT NO. 3.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 9th day of April, A. D., 1923.

No. 11,881.

KRAUSS BROTHERS LUMBER COMPANY

vs.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

No. 11,881 (Sub. No. 1.)

SAME.

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA, TENNESSEE & NORTHERN RAILROAD CORPORATION, ET AL.

Upon further consideration of the record in the above entitled proceeding, and good cause appearing therefor:

It is ordered, That the order entered in this proceeding on November 13th, 1922, authorizing the payment of reparation, be, and it is hereby, amended by eliminating therefrom the Alabama Great Southern Railroad Company as a defendant.

By the Commission.

GEORGE B. MCGINTY,
Secretary.

(SEAL)

EXHIBIT NO. 4.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 8th day of May, A. D., 1923.

No. 11,881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

No. 11,881 (Sub. No. 1.)

SAME.

vs.

DIRECTOR GENERAL, AS AGENT, ALABAMA, TENNESSEE & NORTHERN RAILROAD CORPORATION, ET AL.

Upon further consideration of the record in the above entitled proceeding, and good cause appearing therefor:

It is ordered, That the order entered in this proceeding on November 13th, 1922, as amended by order

entered April 9th, 1923, be, and it is hereby, further amended by striking out the award of reparation against James C. Davis, Director General of Railroads, as agent, in the sum of $2,932.00.

It is further ordered, That this proceeding be, and it is hereby, reopened for such further hearing as the Commission may hereafter direct, solely for the purpose of determining against whom the award of reparation, above referred to, should run and in what amounts.

By the Commission.

GEORGE B. McGINTY,
Secretary.

(SEAL)

(Signed) GEORGE B. McGINTY,
Secretary.

EXHIBIT NO. 5.

INTERSTATE COMMERCE COMMISSION.

No. 11,881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

Submitted October 30th, 1923. Decided Oct. 7th, 1924.

Upon further hearing amended order further modified as to amount of reparation awarded. Original report 66 I. C. C., 637.

Johnson & Elkins and *Harry S. Elkins* for complainant.
John F. Finerty and *Alex M. Bull* for Director General of Railroads, as agent.

REPORT OF THE COMMISSION ON FURTHER HEARING BY THE COMMISSION.

In our original report, 66 I. C. C. 637, we found that demurrage and reconsignment charges assessed on certain carload shipments of lumber reconsigned at Merid-

ian, Miss., and Jackson and Chattanooga, Tenn., were illegal. The original order of reparation contained an item of $2,932 which the Alabama Great Southern and the Director General of Railroads, as Agent, were directed to pay to complainant with interest from March 20th, 1918. This amount of reparation was found due upon 30 carload shipments reconsigned at Chattanooga and was covered by the complaint in No. 11,881 (Sub. No. 1). After the order had been issued attention was directed to the fact that although the Alabama Great Southern was mentioned in the body of the complaint it was not made a party defendant, and had not been served. Accordingly, the order was amended so as to eliminate this item therefrom and a further hearing was had solely for the purpose of determining against whom the award of reparation, above referred to, should run, and in what amounts.

The 30 carloads were shipped during the period from October 24th to December 27th, 1917. Demurrage in the amount of $2,747 on 29 cars was collected for detentions which occurred prior to Federal control, and $180.00 on one car for detention during Federal control. A reconsignment charge of $5.00 was also collected on this car. All of the shipments were delivered and all the charges were collected by the Director General of Railroads during Federal control. The demurrage and reconsignment charges of $185.00 collected on the one shipment accrued to the Director General of Railroads and he clearly became liable therefor. The demurrage charges on the other 29 shipments were credited to the Alabama Great Southern. The real question for determination concerns these shipments, and is: Should the Director

General of Railroads, as agent, hereinafter called defendant be required to refund charges illegally collected by the Director General of Railroads after January 1, 1918, for detention prior to Federal control of cars containing shipments subsequently transported in part and delivered by him.

The liability of defendant in actions arising out of Federal control are set forth in Section 206 of the Transportation Act, 1920, which provides in part:

> (c) Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President, during the period of Federal control of * * * charges, * * * ,which were * * * * in violation of the Interstate Commerce Act, may be filed with the Commission, * * * against the agent designated by the President under subdivision (a), naming in the petition the railroad or system of transportation against whom such complaint would have been brought if such railroad or system had not been under Federal control at the time the matter complained of took place. X X X X X X X.

If there is any authority for the award of reparation against defendant it must be found in this provision. In reference thereto we said in *Terre Haute, Indianapolis & E. T. Co. v. Director General,* 77 I. C. C. 658.

> We believe that this provision was intended to cover charges collected for services performed, at least in part, by the Director General during Federal con-

> trol, and that complaints regarding charges collected by the director general, as agent for the carriers, on account of services performed wholly prior to Federal control, should be filed against the carriers themselves. * * * * Our consideration of the complaint will therefore be confined to shipments which were delivered and on which the charges were paid on or subsequent to January 1, 1918.

In that case transportation charges were in issue. In this case in so far as it concerns the shipments which were detained prior to Federal control, demurrage charges are to be considered. Complainant seeks to base defendant's liability on the mere collection of illegal charges during Federal control. It urges that no right of action accrued until the illegal charges were collected and that the damage was inflicted by the Director General of Railroads. It contends also that the demurrage charges were incidental to the through transportation and that as the Director General of Railroads has completed the transportation service the defendant is liable for illegal demurrage, collected on the shipments just as much as he would be for the collection of illegal transportation charges.

But demurrage charges are no part of the rate or through charge in effect at the time the shipment is forwarded from point of origin. *Getz Brothers & Company v. Director General,* 85 I. C. C. 673. Although they may follow the shipment and be collected together with the transportation charges, they are for a distinct and separate service. The Director General of Railroads performed no part of the service on the 29 carloads

for which the demurrage was collected and in the collection thereof he was acting solely as agent for the corporate carrier. Practically the same situation is presented as in *Terre Haute, Indianapolis & E. T. Co. v. Director General, supra.*

We find that defendant is not liable for the collection of illegal demurrage charges on the 29th shipments as to which the periods of detention were entirely prior to Federal control, but that he is liable for the collection of illegal demurrage charges on the one remaining shipment. The order will be modified accordingly.

ORDER.

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 7th day of October, 1924.

No. 11,881.

KRAUSS BROTHERS LUMBER COMPANY

v.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT; ALABAMA & MISSISSIPPI RAILROAD COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW

JERSEY; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE LONG ISLAND RAILROAD COMPANY; THE MOBILE & OHIO RAILROAD COMPANY; NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILROAD COMPANY; AND PHILADELPHIA & READING RAILWAY COMPANY.

No. 11,881 (Sub. No. 1.)

SAME.

v.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT; ALABAMA, TENNESSEE & NORTHERN RAILROAD CORPORATION; SHREVEPORT, HOUSTON & GULF RAILROAD COMPANY; AND SOUTH BROOKLYN RAILWAY COMPANY.

It appearing, That on March 2nd, 1922, the commission entered its report and on November 13th, 1922, its order awarding reparation in the above entitled proceedings:

It further appearing, That on April 9th and May 8th, 1923, the commission entered its orders amending the said order of November 13th, 1922, and reopened the proceedings for further hearing, which has been had, and the commission having, on the date hereof, made and

filed a report on further hearing, which said report on further hearing is hereby referred to and made a part hereof;

It is ordered, That defendant James C. Davis, Director General of Railroads, as Agent, be, and he is hereby, authorized and directed to pay unto complainant, Krauss Brothers Lumber Company, on or before December 1, 1924, the sum of $185.00 with interest thereon at the rate of six per cent per annum from March 30th, 1918, on account of illegal demurrage and reconsignment charges collected on a carload of lumber reconsigned at Chattanooga, Tenn.

By the Commission.

GEORGE B. MCGINTY,
Secretary.

(SEAL)

EXHIBIT NO. 12.

No. 2879.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

JAMES G. DAVIS, DIRECTOR GENERAL, ETC., ET AL, Defendants.

It is stipulated and agreed that the atached affidavit, waiving all objection to its form, shall be treated as a deposition of the witness, L. J. Tracy, duly taken in this case upon proper notice; except, however, that each and every objection (other than insistence on the production of books or records) which might be made to such testimony, on any part thereof, if offered upon examination of said witness in open court in this case, may be made with like and equal force and effect to said testimony when offered by said affidavit.

J. P. MUDD, Attorney for Plaintiff.
ALEX M. BULL,
STOKELY, SCRIVNER, DOMINICK & SMITH,
Attorneys for Defendants.

CITY OF WASHINGTON,
DISTRICT OF COLUMBIA } ss.

Personally appeared before me, W. B. Robinson, a Notary Public in and for the District of Columbia, L. J. Tracy, who, first being duly sworn, deposes and says that he is the Comptroller for the Director General of Railroads, and as such, has charge of his accounts.

That he has had made under his direction and supervision an examination of the accounts of the Director General of Railroads, and the Alabama Great Southern Railroad Company to ascertain the division between the said Director General of Railroads, and the Alabama Great Southern Railroad Company of the sum of $2,932.00, which is the third item shown in the order of the Interstate Commerce Commission of November 13, 1922, in case No. 11881 Krauss Brothers Lumber Co. v. Director General, as Agent, et al, and in case No. 11881 (Sub. No. 1) same v. Director General of Railroads, as Agent, et al.

That such examination develops that of the said $2,932.00, $185.00, composed of $180.00 demurrage and $5.00 reconsigning charge, was credited to and retained by the said Director General of Railroads, and that the remainder of said $2,932.00, to-wit: $2,747.00, was credited to and retained by the Alabama Great Southern Railroad Company.

L. J. TRACY.

Subscribed and sworn to before me, this 14th day of January, 1926, in the City of Washington, District of Columbia.

(SEAL) W. B. ROBINSON,
Notary Public.

The plaintiff requested in writing the following written charge, which charge the court refused to give, and to which action of the court the plaintiff then and there before the jury retired duly excepted; said charge is as follows:

"If you believe the evidence in this case, you must find your verdict in favor of the plaintiff."

The defendants, separately and severally, requested in writing the following written charge which the court gave, and to which action of the court the plaintiff then and there before the jury retired duly excepted, separately and severally, to the giving of said charge.

"If the jury believe the evidence in this case, your verdict must be for the defendants."

The above bill of exceptions signed by the District Judge, this the 15th day of July, 1926.

W. I. GRUBB, District Judge.

Presented this the 15th day of July, 1926.

W. I. GRUBB, District Judge.

Approved this the 15th day of July, 1926.

W. I. GRUBB, District Judge.

Filed August 19, 1926.

W. S. LOVELL, Clerk.

ORDER TO TRANSMIT ORIGINAL EXHIBITS

Filed July 15, 1926

W. S. Lovell, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

No. 2879.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

ANDREW W. MELLON, Director General of Railroads, as agent, under and by virtue of Section 206, Transportation Act of 1920, Mobile & Ohio Railroad Company, a Corporation, and Alabama Great Southern Railroad Company, a Corporation, Defendants.

It appearing to the court that in this cause it is necessary and proper in the opinion of the court that certain original papers and documents should be inspected in the Circuit Court of Appeals upon writ of error by said court:

It is therefore ordered that the following papers, to-wit: Exhibits 6 to 11, inclusive, referred to and de-

scribed in the bill of exceptions, be transmitted by the Clerk of this court to the Clerk of the Circuit Court of Appeals at New Orleans, La., and returned after the disposition of the writ of error to the Clerk of this Court.

GIVEN, this the 15th day of July, 1926.

W. I. GRUBB,
United States District Judge.

AGREEMENT FOR ORIGINAL EXHIBITS TO BE SENT TO U. S. CIRCUIT COURT OF APPEALS

Filed July 15, 1926

W. S. Lovell, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

No. 2879.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

ANDREW W. MELLON, Director General of Railroads, as agent, under and by virtue of Section 206, Transportation Act of 1920, Mobile & Ohio Railroad

Company, a Corporation, and Alabama Great Southern Railroad Company, a Corporation, Defendants.

The parties to this cause by their respective counsel do hereby stipulate and agree as follows:

That the plaintiff's exhibit No. 6 and that the defendants' exhibits 7, 8, 9, 10 and 11 may be omitted from the bill of exceptions, and sent by the Clerk of the trial court direct to the Court of Appeals in their original form, and further that the exhibits need not be printed in the record. This agreement is made in conformity with an order of the trial court by the presiding judge that said exhibits, viz: 6, 7, 8, 9, 10 and 11 shall be omitted from the record, and sent direct by the Clerk of the trial court to the Court of Appeals.

J. P. MUDD, Attorney for Plaintiff.
A. M. BULL,
STOKELY, SCRIVNER, DOMINICK & SMITH,
Attorneys for Defendants.

PETITION FOR WRIT OF ERROR

Filed July 24, 1926

W. S. Lovell, Clerk

PETITION OF KRAUSS BROTHERS LUMBER COMPANY FOR WRIT OF ERROR.

IN THE DISTRICT COURT OF UNITED STATES
IN AND FOR THE SOUTHERN DIVISION
OF THE NORTHERN DISTRICT
OF ALABAMA.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT under and by virtue of Section 206, Transportation Act of 1920, MOBILE & OHIO RAILROAD COMPANY, a Corporation, and ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a Corporation, Defendants.

TO THE HONORABLE W. I. GRUBB, JUDGE OF SAID COURT:

Now, comes the Krauss Brothers Lumber Company, the Plaintiff, by J. P. Mudd, its attorney, and feeling

itself aggrieved by the final judgment of this court rendered against it and in favor of Andrew W. Mellon, as Agent, on the 1st day of May, 1926, hereby prays that a writ of error may be allowed to it from the United States Circuit Court of Appeals for the Fifth Circuit to the District Court of the United States for the Southern Division of the Northern District of Alabama, and, in connection with this petition, the petitioner herewith presents its assignment of error.

Petitioner further prays that an order of supersedeas be entered herein pending the final disposition of the cause, and that the amount of security may be fixed by the order allowing the writ of error.

J. P. MUDD,
Attorney for Plaintiff in Error.

ORDER ALLOWING WRIT OF ERROR

Filed July 24, 1926

W. S. Lovell, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT under and by virtue of Section 206, Transportation Act of 1920, MOBILE & OHIO RAILROAD COMPANY, a Corporation, and ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a Corporation.

This 24th day of July, 1926, came the plaintiff in error by its Attorneys, and filed herein and presented to the Court its petition, praying for the allowance of a writ of error, an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment here was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth

Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the plaintiff in error giving bond according to law in the sum of Five Hundred Dollars, to be approved by this Court.

W. I. GRUBB,
United States District Judge.

ASSIGNMENT OF ERROR

Filed July 24, 1926

W. S. Lovell, Clerk

ASSIGNMENT OF ERROR

IN THE DISTRICT COURT OF UNITED STATES
IN AND FOR THE SOUTHERN DIVISION
OF THE NORTHERN DISTRICT
OF ALABAMA.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT under and by virtue of Section 206, Transportation Act of 1920, MOBILE

& OHIO RAILROAD COMPANY, a Corporation, and ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a Corporation, Defendants.

And now comes the plaintiff in error by J. P. Mudd, its attorney, and in connection with its petition for a writ of error says that in the record, proceedings, and in the final judgment aforesaid, manifest error has intervened to the prejudice of the plaintiff in error, to-wit:

1. The court erred in giving the following written charge to the jury as requested by the defendant: "If the jury believe the evidence in this case your verdict must be for the defendants."

2. The court erred in not charging the jury as requested in writing by the plaintiff as follows: "If you believe the evidence in this case you must find your verdict in favor of the plaintiff."

3. The court erred in rendering judgment in favor of the defendants.

4. The court erred because the verdict is contrary to the evidence and the law.

5. The court erred in allowing the defendants to introduce in evidence over the plaintiff's timely objection Exhibit 7, the same being pleadings before the Interstate Commerce Commission.

6. The court erred in allowing the defendants to introduce in evidence over the plaintiff's timely objection Exhibit 8, the same being the testimony and all of the exhibits taken and filed before the Interstate Commerce Commisison at the hearing on January 10th, 1921.

7. The court erred in allowing the defendants to introduce in evidence over the plaintiff's timely objection Exhibit 10, the same being the correspondence which led up to the two orders of the Interstate Commerce Commission eliminating the Alabama Great Southern Railroad as a party defendant.

8. The court erred in allowing the defendants to introduce in evidence over the plaintiff's timely objection Exhibit 11, the same being the testimony and exhibits offered at the hearing before the Interstate Commerce Commission when said Commission re-opened the hearing to determine how much was due from the Director General to the plaintiff, and how much was due from the Alabama Great Southern Railroad to the plaintiff.

9. The Court erred in allowing the defendants to introduce in evidence over the plaintiff's timely objection Exhibit 12, the same being an affidavit of Mr. Tracey.

By reason thereof plaintiff in error prays that the judgment aforesaid may be reversed.

J. P. MUDD,
Attorney for Plaintiff in Error.

Presented this the 24th day of July, 1926.

WRIT OF ERROR

UNITED STATES OF AMERICA, ss.

The President of the United States:

To the Honorable Judges of the Circuit Court of the United States for the Fifth Judicial Circuit—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Krauss Brothers Lumber Company, a Corporation, and Andrew W. Mellon, Director General of Railroads, as Agent, under and by virtue of Section 206, Transportation Act of 1920, Mobile and Ohio Railroad Company, a Corporation, and Alabama Great Southern Railroad Company, a Corporation, a manifest error hath happened, to the great damage of the said Krauss Brothers Lumber Company, a Corporation, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do commnad you, If judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, together with this writ, so that you have the same at New Orleans, Louisiana, within thirty days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings afore-

said being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 24th day of July, in the year of our Lord one thousand nine hundred and Twenty-Six.

W. S. LOVELL,
Clerk of the U. S. District Court Northern District of Alabama.

Allowed by
W. I. GRUBB,
Judge of the United States District Court, Northern District of Alabama.

BOND.

Filed July 24, 1926

W. S. Lovell, Clerk

Know All Men by these Presents: That we, Krauss Brothers Lumber Company, Inc., as principal, and American Surety Company of New York, a Corporation, as surety, are held and firmly bound unto Andrew W. Mellon, as Agent, Mobile and Ohio Railroad Company, Inc. and Alabama Great Southern Railroad Company, Inc. in the full and just sum of Five Hundred ($500.00)

Dollars, to be paid to the said Andrew W. Mellon, as Agent, Mobile and Ohio Railroad Company, Inc. and Alabama Great Southern Railroad Company, Inc. its certain attorneys, executors, administrators or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 23rd day of July, in the year of our Lord one thousand nine hundred and twenty-six.

Whereas, lately at the present term of the District Court of the United States, for the ..... Division of the Northern District of Alabama, in a suit pending in said Court between Krauss Brothers Lumber Company, Inc., plaintiff, and Andrew W. Mellon, as Agent, a judgment was rendered against the said Krauss Brothers Lumber Company, and the said Krauss Brothers Lumber Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Andrew W. Mellon, as Agent, citing and admonishing him to be and appear at THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, to be holden at New Orleans, La., within ..... days from the date hereof.

Now, the Condition of the Above Obligation is Such, That if the said Krauss Brothers Lumber Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make the said

plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

KRAUSS BROTHERS LUMBER CO., INC.
By J. P. MUDD, Attorney.

AMERICAN SURETY COMPANY OF NEW YORK,
By CHAS. VOUTI CORNELL,
Attorney-in-Fact.

Countersigned: D. M. ZIMMERMAN.

Approved by:
W. I. GRUBB,
Judge of the United States District Court, Northern District of Alabama. 7/24/26

CITATION

Filed July 24, 1926

W. S .Lovell, Clerk

UNITED STATES OF AMERICA

The President of the United States:

To Andrew W. Mellon, as Agent under Section 206, Transportation Act; Mobile & Ohio Railroad Company, Inc., and Alabama Great Southern Railroad Company—Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fifth Judicial Circuit to be holden at New Orleans, La.

Pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the Southern Division of the Northern District of Alabama, wherein Krauss Brothers Lumber Company, a Corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, The Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 24th day of July, in the year of our Lord one thousand nine hundred and Twenty-Six.

W. I. GRUBB,
U. S. Dist. Judge.

Service of the within is hereby accepted by each of the defendants in error separately and severally.

This July 26, 1926.

S. P. SMITH,
Attorney of Record for Each of the Defendants in Error.

STOKELY, SCRIVNER, DOMINICK & SMITH,
Attorneys of Record for Defendants in Error.

CLERK'S CERTIFICATE

THE UNITED STATES OF AMERICA
NORTHERN DISTRICT OF ALABAMA

I, W. S. Lovell, Clerk of the District Court of the United States for the Southern Division of the Northern District of Alabama, do hereby certify that the foregoing pages numbered from one (1) to ninety-four (94), both inclusive, is a full, true and correct transcript of the record in the matter of Krauss Brothers Lumber Company, a Corporation, Plaintiff in Error, versus Andrew W. Mellon, Director General of Railroads, as agent, under Section 206, Transportation Act of 1920, Mobile & Ohio Railroad Company, and Alabama Great Southern Railroad Company, Defendants in Error, as fully as the same appears of Record and on file in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court, at Birmingham, in said District, on this the 15 day of September, A. D. 1926.

W. S. LOVELL,
Clerk U. S. District Court, Northern District of Alabama.

Minute entry of argument and submission January 26, 1927, omitted in printing.

In United States Circuit Court of Appeals, Fifth Circuit

No. 4910

Krauss Brothers Lumber Company, a Corporation, Plaintiff in Error,

vs.

Andrew W. Mellon, Director General of Railroads, as Agent, et al., Defendants in Error

Error to the District Court of the United States for the Northern District of Alabama

Brenton K. Fisk, (Harry S. Elkins, J. P. Mudd, on the brief), for Plaintiff in Error.

Sidney P. Smith (Stokely, Scrivner, Dominick & Smith; Sidney F. Andrews; Alex M. Bull, on the brief), for Defendants in Error.

Before Walker, Bryan and Foster, Circuit Judges

Opinion—Filed April 7, 1927

Foster, Circuit Judge:

Plaintiff in error, plaintiff below, filed suit to recover $10,356, based on a reparation order of the Interstate Commerce Commission. The order annexed to the pleadings shows that plaintiff shipped certain carloads of lumber from various points in Mississippi, Alabama, Louisiana and Texas where it had mills, consigned to designated stations on the lines of defendants' railroads, some shipments being made before and some during Federal control. The lumber had not been sold when shipped, but before or after arrival at the initial destinations plaintiff sent reconsignment orders to defendants. In each instance there was an embargo in force against the point to which reconsignment was asked and compliance with the orders was refused. In consequence of delay demurrage and other

charges accrued and were collected. The Interstate Commerce Commission held that demurrage and other charges accruing at reconsignment points were not collectible unless set out in the tariffs filed, and made the reparation order accordingly.

At the close of all the evidence each side moved the Court for a directed verdict and did nothing more. The Court denied the motion of plaintiff and granted that of defendants without stating his reasons. Error is assigned to the action of the Court just noted. No other errors are assigned or suggested.

While an order of the Interstate Commerce Commission is necessary in most instances before a recovery of overcharges may be had it is not conclusive. The order of the Commission is prima facie evidence of the facts therein stated but it establishes only a rebuttable presumption, and all the issues are open before the court and the jury as in other cases. And in the Appellate Court the evidence adduced before the Commission, if offered on the trial in the District Court, and any additional evidence properly received, may be considered in support of or to correct the findings stated in the order. Meeker vs. Lehigh Valley Railroad, 236 U. S. 412-430; Pennsylvania R. R. Co vs. W. F. Jacoby & Co., 242 U. S. 89; Pennsylvania R. R. Co. vs. Weber, 257 U. S. 85.

It is well settled that where both parties ask the court for an instructed verdict without more and error is assigned only to the rulings of the court on the motions the appellate court must affirm if there is any evidence to support the verdict. Beuttell vs. Magone, 157 U. S. 154.

Turning to the record in this case, the bill of exceptions shows that the plaintiff offered in evidence what were denominated as exhibits 1, 2, 3, 4, 5, & 6, while defendants offered exhibits 7, 8, 9, 10, 11 & 12. The exhibits offered by plaintiff, speaking generally, were certified copies of orders made by the Interstate Commerce Commission and a copy of a certain rule of that Commission. The exhibits offered by the defendant consisted of the pleadings, some 200 pages of testimony and copies of tariffs and other documents, all of which were before the Commission at the hearing from which the reparation order resulted, and certain correspondence and an affidavit from a witness, Tracey, intro-

duced in the District Court. The bill of exceptions concludes with this statement:

"The plaintiff's exhibits referred to as Exhibits No. 1, Exhibit No. 2, Exhibit No. 3, Exhibit No. , Exhibit No. 5, and the defendants' Exhibit No. 12 are her inafter set forth fully as a part of this bill of exceptions. By virtue of an order of the Presiding Judge, W. I. Grubb, plaintiff's Exhibit No. 6 and the defendants' exhibits numbers 7, 8, 9, 10 and 11, respectively, are omitted from this bill of exceptions in order that they may be sent by the Clerk of the lower court, in compliance with the said order of the Presiding Judge, direct to the Court of Appeals."

Following this in the transcript appears an order of court and a stipulation signed by attorneys for both plaintiffs and defendants, as quoted below:

"It appearing to the court that in this cause it is necessary and proper in the opinion of the court that certain original papers and documents should be inspected in the Circuit Court of Appeals upon writ of error by said court:

"It is therefore ordered that the following papers, to-wit: Exhibits 6 to 11, inclusive, referred to and described in the bills of exceptions, be transmitted by the Clerk of this court to the Clerk of the Circuit Court of Appeals at New Orleans, La., and returned after the disposition of the writ of error to the Clerk of this Court.

"The parties to this cause by their respective counsel do hereby stipulate and agree as follows:

"That the plaintiff's exhibit No. 6 and that the defendants' exhibits 7, 8, 9, 10 and 11 may be omitted from the bill of exceptions, and sent by the Clerk of the trial court direct to the Court of Appeals in their original form, and further that the exhibits need not be printed in the record. This agreement is made in conformity with an order of the trial court by the presiding judge that said exhibits, viz: 6, 7, 8, 9, 10 and 11 shall be omitted from the record, and sent direct by the Clerk of the trial court to the Court of Appeals."

Conformable to the just quoted paragraphs, plaintiff's exhibit 6, about which we are somewhat in the dark, and defendants' exhibits 7, 8, 9, 10 and 11, consisting of all the evidence before the Commission including, we presume, copies of the tariffs on file, and other evidence which was before

the District Court, are not included in the bill of exceptions and are not printed in the transcript, but the original documents are sent up in compliance with the order and agreement but without anything to show they are made a part of the bill.

Our rule 14, paragraph 4 provides:

"Whenever it shall be necessary or proper in the opinion of the presiding judge in any Circuit or District Court, that original papers of any kind should be inspected in this Court upon writ of error or appeal, such presiding judge may make such rule or order for the safekeeping, transporting and return of such original papers as to him may seem proper; and this Court will receive and consider such original papers in connection with the transcript of the proceedings."

In passing we take occasion to say that the order transmitting part of the evidence in this case in the original should not have been granted. Agreement of counsel is no excuse for entering the order. The rule is intended to permit the transfer to this court of disputed documents; maps and blue prints not readily copied; and models and exhibits impossible to incorporate in the printed record. It was never intended to permit the sending up of a mass of original documents that could have been copied in the printed record, for the purpose of saving expense, especially where, as in this case, it is patent that the material facts could have been culled out and incorporated in the record by a mere statement.

From the above it is plain that all of the evidence upon which the case was tried is not in the bill of exceptions. The order of Court sending up the documents in the original does not purport to make them a part of the bill of exceptions, the rule of this court could not incorporate them therein, and the agreement of counsel expressly excludes them.

As applicable to the deficiency of the record here shown the well settled rule is this. Depositions, exhibits or certificates not contained in the bill of exceptions can not be considered even though found in the printed transcript. The parties by their affidavits or agreements can not cause that to become a bill of exceptions which is not such in a

legal sense. Where instructions of the court are assigned as error on a motion to direct a verdict or otherwise, unless the entire evidence pertinent to the question is in the bill the Appellate Court must presume that the omitted evidence justified the instruction.

Russell vs. Ely, 2 Black 575; Reed vs. Gardner, 17 Wall. 409; U. S. vs. Copper Queen Mining Co., 185 U. S. 495; Nashua Sav. Bank vs. Anglo-Am. Mortg. Co., 189 U. S. 221; Metropolitan R. R. Co. vs. Dist. of Columbia, 195 U. S. 322; U. S. ex rel Kinney vs. U. S. Fidelity Guarantee Co., 222 U. S. 283.

In view of the state of the record we are unable to review the judgment of the District Court.

Affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—April 7, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiff in error, Krauss Brothers Lumber Company, and the surety on the writ of error bond herein, American Surety Company of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING—Filed May 10, 1927

Comes now the plaintiff-in-error, by Brenton K. Fisk as its attorney, and hereby petitions the Court to grant a rehearing of the above entitled case. As the ground for this petition the plaintiff-in-error avers that the Court has

violated Rule 7, "Revised Rules of the Supreme Court of the United States," which, by Rule VIII of this Court, has been expressly adopted.

The violation of said rule is apparent from the record and more particularly from the following points apparent therein:

(a) The Interstate Commerce Commission's findings of fact were not placed in issue in the District Court. Otherwise a directed verdict could not have been given; for these findings, unlike fictitious presumptions which are used only where there is no evidence, remain by virtue of the Interstate Commerce Act the ascertained and declared facts unless and until disproved.

(b) The bill of exceptions shows that no damaging admissions were made and that no new evidence was introduced except such as was fully embraced therein.

(c) The bill of exceptions, prepared under the supervision of the District Judge and bearing his official indorsement and approval, duly certifies that it contains all the evidence in the case.

(d) The word "omit," used in the bill of exceptions, was used advisedly, being the precise word used in the title to Rule 7, "Revised Rules of the Supreme Court of the United States", in relation to cumbersome and irrelevant matter not to be embraced in bills of exceptions.

(e) The findings of fact, which are ascertained facts and not groundless presumptions, together with the clear record that none of these findings was disputed and the discretionary certification of the District Court, under Rule 7, that all (material or relevant) evidence was set forth in the bill of exceptions, are further strengthened by the record's disclosure of the nature of the case and of the admissions made therein.

(f) The Commission's findings show that the entire controversy was confined to a single issue involving an important question in respect to the Commission's powers, namely:

1. When a car movement is delayed at a reconsigning point as the result of an embargo, may the shipper be charged for the delay without an express tariff provision authorizing such a charge?

2. The carriers' contention was that a reconsignment is equivalent to an entirely new shipment; that an embargo is a lawful excuse for declining to accept a car for initial shipment and therefore, despite any contrary rulings of the Commission, is a lawful excuse for failure to reconsign; that a refusal to reconsign makes the intermediate destination become the ultimate destination, whereupon demurrage commences to accrue as if the shipper had not duly demanded his non-discriminatory tariff right to reconsign.

3. The Commission found, as a fact, that an administrative rule which had been long enforced and generally recognized forbade the carriers to profit from their embargoes except where precise tariff provisions stipulated that charges for delay might be assessed for delays resulting from embargoes.

4. The Commission found, as the controlling point of law, that this administrative regulation had wholly superseded the common law on which the carriers relied. (This was obviously the point in the case.)

5. The Commission requested the parties to file formal stipulations showing the charges which had been imposed upon the shipper in violation of the principle aforestated. Such stipulations were filed and therefrom the reparation order was prepared.

The plaintiff-in-error respectfully urges, and earnestly believes, that in view of the state of the record, Rule 7, "Revised Rules of the Supreme Court of the United States", both authorized and directed the District Court to omit from the bill of exceptions all that unusually great mass of irrelevant exhibits which in no substantial sense whatsoever can be deemed any part of the evidence in the case and which consisted of several records and transcripts of proceedings before the Interstate Commerce Commission with exhibits thereto, including a massive file of embargo circulars, also complete files of correspondence and other similar writings, all of which would have made a cumbersome record of great volume and would have cost an enormous sum in the preparation and printing thereof.

Respectfully submitted,

(Signed) Brenton K. Fisk, Attorney for Plaintiff-in-Error.

May 7, 1927.

I hereby certify that I have duly served (3) copies of the foregoing petition upon each of the defendants in error therein named by mailing same, registered mail, duly addressed to Alex M. Bull, attorney of record for Director General, United States Railroad Administration, Washington, D. C. and to Sidney Smith, attorney of record for Mobile & Ohio Railroad Company and Alabama Great Southern Railroad Company, First National Bank Building, Birmingham, Alabama.

(Signed) Brenton K. Fisk.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—May 23, 1927

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 24, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ. And it is further ordered that the argument be limited to the question of practice in respect to the bill of exceptions upon which the case in the Circuit Court of Appeals was made to turn.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 342

KRAUSS BROTHERS LUMBER COMPANY,
PETITIONER,

v.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT UNDER AND BY VIRTUE OF SECTION 206, TRANSPORTATION ACT OF 1920; MOBILE & OHIO RAILROAD COMPANY, A CORPORATION, AND ALABAMA GREAT SOUTHERN RAILROAD COMPANY, A CORPORATION, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Krauss Brothers Lumber Company, respectfully shows:

1. PARTIES.—The petitioner, Krauss Brothers Lumber Company, hereafter called "shipper," is a corporation engaged in the wholesale lumber business, to whom the Interstate Commerce Commission, on shipper's formal complaint, ordered the respondents herein to pay reparation in the amount of $10,356 because of unlawful demurrage charges illegally collected. The respondents having failed to comply with the reparation order, the present suit thereon was filed against them in the United States District Court for the Northern District of Alabama by petitioner as plaintiff, pursuant to Section 16 of the Interstate Commerce Act.

2. NATURE OF PROCEEDING.—No issue on the reasonableness of any charge or practice was raised in any of the Interstate Commerce Commission's proceedings in this case. Neither was it denied that the respondents, in making the demurrage charges of which shipper complained, had disregarded a well-known and generally recognized administrative practice upon which the Commission had uniformly insisted. The sole issue was whether any such power had been vested in the Commission as would give it jurisdiction to decide that the charges should be refunded. Upon the Commission's decision (purely as a matter of law) that the Commission had such power, the parties, following its suggestion, filed formal stipulations under Rule V of the Commission's practice admitting the amounts of the charges, the illegality of which had been declared by the Commission, and thereupon the reparation order was made.

The conflicting views of the applicable law of the case arose out of facts which were mutually assumed by the parties and subsequently admitted, as aforestated. The shipper for years had made a practice of shipping lumber in carload quantity from points in the South to Cincinnati and other gateway points, and thereafter reconsigning the shipments to customers who had purchased them while in transit. Prior to January 13, 1918, there were no applicable tariff provisions in effect which stated that demurrage charges might be assessed for embargo delays at reconsigning points. The Interstate Commerce Commission for years had uniformly insisted upon the administrative practice of charging no demurrage for delays in carrying out reconsignment instructions, where the delays resulted from embargoes, pointedly observing that the carriers should not be permitted to profit from embargoes which they, themselves, declared. The charges involved in the present case had all been imposed prior to January 13, 1918, on which date there became effective certain tariff provisions specifically authorizing such charges.

The views of the defendants were that the Commission had no power to order a return of these demurrage charges, because (1) offering a shipment for reconsignment relates back to the initial tender of it for transportation, and (2) since the common law, quite outside the control of the Commission, empowers a carrier to reject a tender of goods for initial transportation while there are existing embargoes, likewise the same rule of common law, despite any insistence of the

Commission, authorizes rejection of a demand for reconsignment to points embargoed at the time of initial acceptance for shipment, whereupon demurrage accrues until the consignee accepts actual delivery of the goods. (The Commission's finding of facts and order appear in the record at pages 60 to 66, inclusive.)

3. History of the Case.—Upon formal proceedings, the Interstate Commerce Commission, on March 2, 1922, rendered its opinion, holding that shipper was entitled to a reparation order, and suggesting that the parties file formal stipulations under Rule V of its practice admitting and settling the items. On November 13, 1922, it issued a reparation order in the case, reciting that such stipulations had been filed and that the order was based thereon. The Director General alone was ordered to repay $2,894. He and respondent Mobile & Ohio Railroad Company were ordered to repay an additional $4,530, while he and respondent Alabama Great Southern Railroad were ordered to repay a still further sum of $2,932, all with interest.

Payment not having been made on or before December 28, 1922, as directed by the Commission, the present suit thereon was filed by petitioner as plaintiff against respondents as defendants on March 20, 1923, in the United States District Court for the Northern District of Alabama. The complaint conformed to the provisions of Section 16, Interstate Commerce Act, and contained the findings and order of the Commission as a part thereof.

After the subject-matter of the controversy had thus been placed in the court, the respondents, or one or more of them, sought a reopening of the case by the Commission. After a correspondence by letter between the Commission and such respondents, an order was made by the Commission reciting that respondent Alabama Great Southern Railroad had been eliminated from the Commission's proceedings because it had never been made a party thereto. Later, on May 8, 1923, the Commission made an order purporting to reopen the case. (Petitioner considers all the proceedings of the Commission in this case subsequent to the filing of the present action in the district court void for want of jurisdiction by the Commission over the subject-matter.)

Upon the reopening of the case, the Director General showed that he had remitted to the Alabama Great Southern Railroad in settlements with it all but $185 of the $2,932 item of charges, which item represented demurrage charges that accrued prior to the period of Federal control. On the theory that shipper's sole remedial right was to bring an action for *money received to shipper's use*, the Commission, on October 7, 1924, issued a finding of facts and order purporting to modify its original findings and order and to excuse the Director General from liability on all but such $185 of such $2,932 item.

On May 1, 1926, the present case in the district court, which had been filed March 20, 1923, as aforestated, came on for trial. Demurrers to the complaint, as originally filed, were overruled. Additional counts

were inserted by amendment and a demurrer to them also was overruled.

Thereupon the shipper, as plaintiff, duly introduced into the evidence the Commission's original findings (R., 60), the original order (R., 65), the order purporting to eliminate Alabama Great Southern Railroad Company (R., 67), the order purporting to reopen the case (R., 68), and the report and order purporting to modify and supplement the original findings and order (R., 70-76). Also the stipulations filed before the Commission under Rule V of its practice were put in evidence by shipper. It was stipulated in open court that shipper had not been paid any of the reparation which had been ordered (R., 57), also that only $245 of the $4,530 item which the Mobile & Ohio Railroad Company and the Director General had both been ordered to repay had ever been remitted by the Director General to the railroad corporation in settlements.

Thereupon shipper closed his case.

The respondents, over shipper's due objection that the same were incompetent, immaterial and irrelevant to any issue in the case, was permitted to place in evidence the following (R., 58):

1. The original pleadings before the Commission (R., 58).

2. The testimony and all exhibits taken and filed in the Commission's proceedings.

3. Petition for reopening the case.

4. Correspondence with Commission leading up to the reopening.

5. Testimony and exhibits in the proceedings after the reopening.

6. An affidavit (treated by stipulation as a deposition) showing that all but $185 of said $2,932 item had been remitted by the Director General of the Alabama Great Southern Railroad Company, as aforesaid.

Thereupon the respondents closed their case and shipper duly moved for a directed verdict, which motion was overruled and an exception noted. The respondents thereupon moved for a directed verdict, which motion was granted and shipper duly excepted (R., 79).

On July 24, 1926, a writ of error to the Circuit Court of Appeals for the Fifth Circuit was duly issued on the specified grounds that the district court had erred in overruling petitioner's motion for a directed verdict and also in directing a verdict in favor of respondents.

The bill of exceptions, which sets forth all of the foregoing, duly recites, "*This was all the evidence in the case.*" (R., 59).

The exhibits filed by respondents were exceedingly voluminous, there being, among other things, a complete file of embargo circulars included as a part of the evidence which had been placed before the Commission in the first proceeding. Since the findings of the Commission had not been attacked in the district court on any ascertainment of fact therein set forth and since the great mass of documentary exhibits which had been introduced by respondents not only related, for the most part, to proceedings by the Commission after it

had lost control of the subject-matter, there seemed to be a proper case for the application of Rule 7 of the Supreme Court (adopted by the circuit court by its Rule VIII) requiring the omission from the bill of exceptions of long and irrelevant documents. Accordingly, all of the Commission proceedings, except the several findings of fact and orders, were omitted from the bill of exceptions. The district judge duly approved the bill of exceptions, which contained the usual statement that it set out all the evidence in the case. Nevertheless, the parties stipulated, and the district court pursuant thereto ordered, that the omitted papers be transmitted to the circuit court of appeals under rules which will be set out in the accompanying brief.

The circuit court of appeals declined to pass upon the merits of the case, stating in its opinion (R., 96) that its action was based solely upon the omission, from the bill of exceptions, of documentary exhibits. The stated necessity for these documents is based upon an assumption that the Commission's ascertainment and finding of the facts have no greater weight than mere ordinary legal presumptions, such as those used to fill omissions in evidence. Based upon this assumption, which petitioner believes to be false, the court further presumes that the omitted exhibits contained evidence warranting the action of the trial judge in declining to leave the determination of any of the issues to a jury. In view of the clear-cut admissions and the legal issue presented by the Commission's report, it is not easy to imagine what such evidence might have been.

4. The Fundamental Errors.—The circuit court of appeals erred in conceding to the Interstate Commerce Commission's ascertainment and declaration of facts less evidential value than is given to an ordinary presumption.

The court also violated Rule 7, "Revised Rules of the Supreme Court of the United States," which had been adopted by the circuit court of appeals in its Rule VIII. In the light of the modern tendency toward avoiding prolixity in appeal records, the Supreme Court, in Rule 7, requires that wholly irrelevant matter be *omitted* from appeal records. The opinion of the court shows no necessity for any of the omitted documents to be before it, except necessity arising out of its discrediting the findings of the Commission.

The record shows clearly that the district court, without additional facts, decided the case upon the jurisdictional ground. None of the evidence submitted by respondents was submitted in such form that it could have been intended for a jury. The case stands, therefore, as a decision against the statutory powers of the Commission in all such cases.

As this case now stands, it appears that there was no way in which the simple issue of law, decided by the Commission, could possibly have been brought by petitioner up to the circuit court of appeals without a most unreasonably prolix and expensive record.

5. Important Reasons for Allowance of Writ.—The opinion of the circuit court of appeals gravely discredits the Interstate Commerce Commission by wholly rejecting its statement of the facts when admittedly

the only ground for the rejection is a presumption that is necessarily most flimsy in view of the disclosures of the record.

The fact that the clear-cut question of law which was placed before the Commission as the one and only issue in this case could not be carried to the circuit court of appeals without printing in the record a complete file of correspondence, a file of embargo circulars, records of Commission proceedings subsequent to the transfer of the case out of the Commission's jurisdiction, even when counsel and the trial judge earnestly endeavored to comply with Rule 7 of this Court, presents a most grave situation.

The district court's action in deciding, as a matter of law, that the uncontroverted findings of the Commission in this case would not support a verdict rests the case squarely upon the proposition that the railroads had a right to disregard an administrative practice which the Commission for years had been requiring them to observe and had a right to impose demurrage charges where the tariffs did not so provide and where the Commission uniformly forbade their imposition.

WHEREFORE, because of the gravity and importance of the aforementioned and other questions involved, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the judges of the United States Circuit Court of Appeals for the Fifth Circuit commanding them and each of them to certify and to send to this Court on a day certain to be therein designated,

a full and complete transcript of the record of the proceedings of that court in this case, which was there entitled, "Krauss Brothers' Lumber Company, a corporation, plaintiff in error, *v.* Andrew W. Mellon, Director General of Railroads, as Agent, under Section 206, Transportation Act of 1920; Mobile & Ohio Railroad Company, and Alabama Great Southern Railroad Company, defendants in error, No. 4910," to the end that the judgment of said court in such case may be reviewed as provided in Section 240 of the Judicial Code; that this Court will revise said judgment, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate.

KRAUSS BROTHERS LUMBER COMPANY,
Petitioner.
By BRENTON K. FISK,
As Its Attorney.

STATE OF NEW YORK,
County of New York, ss:

Brenton K. Fisk, being duly sworn according to law on his oath says: I am attorney for Krauss Brothers' Lumber Company, the petitioner named in the foregoing petition. The petition is true of my own knowledge.

BRENTON K. FISK.

Subscribed in my presence and sworn to before me at New York, N. Y., on this the 28th day of June, 1927.

[NOTARIAL SEAL] MARGARET A. CROWE,
Notary Public, Queens County No. 315.

Notary Public, New York County Clerk's No. 557.
New York County Register's No. 9398.
Commission expires March 30, 1929.

Certificate of Counsel.

I hereby certify that I have examined the foregoing petition, and in my opinion it is well founded, and the case is one in which the prayer of the petition should be granted by this Court.

BRENTON K. FISK,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 342

KRAUSS BROTHERS LUMBER COMPANY,
PETITIONER,

v.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT UNDER AND BY VIRTUE OF SECTION 206, TRANSPORTATION ACT OF 1920; MOBILE & OHIO RAILROAD COMPANY, A CORPORATION, AND ALABAMA GREAT SOUTHERN RAILROAD COMPANY, A CORPORATION, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of Case.

The statement of the case has been made by the Interstate Commerce Commission (R., 60-66).

The first question requires an interpretation of the seventh "Revised Rules of the Supreme Court of the

United States," which the Circuit Court of Appeals for the Fifth Circuit had expressly adopted, reading in part as follows:

> 7. BILLS OF EXCEPTIONS—OMISSION OF UNNECESSARY EVIDENCE.—The judges of the district courts in allowing bills of exception shall give effect to the following rules:
>
> * * * * * * *
>
> 2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved * * *.

Plain recitals by the Interstate Commerce Commission of admissions made before it in formal proceedings cannot be disregarded unless the Commission is to be most completely discredited. The Commission says (R., 63):

> "Defendants admit that demurrage should not be assessed if the destinations were not under embargo when the shipments left the point of origin * * *."

Such a statement, if not to be discredited, means clearly that there was admitted (*a*) the existence of applicable reconsigning tariffs, (*b*) under which no inconvenience or inexpediency *at the time or place of reconsignment* would avail the carriers as justification for charging demurrage. The statement by the Commission, setting forth the issues, further shows that the carriers rested the entire case upon the Commis-

sion's alleged want of statutory power to order a refund of the charges. The stipulations, filed under Rule V of the Commission's practice (R., 65-66), necessarily admitted and settled the items and amounts recoverable. (See footnote.)

There is an obvious difference between the following two classes of cases in which a Commission goes beyond its granted powers:

> First. Where the Commission, in stating what purports to be facts ascertained by it, has apparently remained within the scope of its authority, but, examination of the whole record shows that one or more statements set forth as ascertained facts were not based upon evidence and were accordingly mere arbitrary statements of a wholly unauthorized nature.
>
> Second. Where the Commission makes no ascertainment of any controverted fact but limits its inquiry to questions of law and the subject-

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Footnote.—In view of the Commission's statement of the carriers' admissions, it is difficult for petitioner to attach importance to the following statements in the brief which respondents filed in the circuit court of appeals:

> "An examination of the rules in the tariffs (Exhibits 1 and 2 to the testimony before the Commission, which is Exhibit 8 in this record, p. 58) makes it clear that they are not of such character as to take away from these defendants the rights which the law gives them, in fact they are largely administrative or regulatory. For example, Rule 3 in Mobile and Ohio tariff (Exhibit No. 1) states that company will "undertake" to comply with "proper" requests, etc., and the Alabama Great Southern Ry. tariff, Rule 1 (Exhibit No. 2), carries similar provisions with the further limitation "when practical to do so," but without assuming any responsibility in connection therewith, and "solely as an accommodation to the owner."

matter of its inquiry lies beyond the scope of its granted powers.

If there were any ground for contending that the present case might be one of the "first" class last mentioned, there could be no doubt of the necessity for placing before the court the entire record of all evidence before the Commission. Since, however, the only possible controversy in this case—the controversy to which the case was narrowed on its initial hearing—arises under the "second" classification, where no possible state of the evidence could affect the determination, it seems clear that the presentation to the court of a complete record of all the deliberations of the Commission might justly vex the court because of unnecessary prolixity of the record and injure the litigants by amassing exorbitant cost bills.

Despite the seemingly clear irrelevancy of the transcripts, exhibits, correspondence and other data constituting the complete records of the several proceedings of the Commission, the district judge, at the request and pursuant to stipulation of counsel, ordered the transmission of these papers to the circuit court of appeals as a part of the record not incorporated in the transcript. Some of the rules of the circuit court of appeals bearing upon the propriety of such a course are as follows:

> XXXIV. Models, Diagrams and Exhibits of Material.—1. Models, diagrams and exhibits of material forming part of the evidence taken in the court below, and in any case pending in this court, on writ of error or appeal, shall be

placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

XIV. Writs of Error, Appeals, Return and Record.—4. Whenever it shall be necessary or proper in the opinion of the presiding judge in any circuit or district court that original papers of any kind should be inspected in this Court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting and return of such original papers as to him may seem proper; and this Court will receive and consider such original papers in connection with the transcript of the proceedings.

XXIII. Printing Records.—3. The clerk shall take to the printer the original transcript on file, but shall cause copies to be made for the printer of such original papers sent up under Rule 14, or other original papers, as are necessary to be printed.

The foregoing seem to show that Rule XXXIV refers to evidence outside a bill of exceptions which could not readily be incorporated therein, while Rules XIV and XXIII apply to evidence which, although not in the bill of exceptions, is printable and therefore might have been embraced therein. Rule XXIII further provides (2) that the Court may order the printing of portions of the record in addition to what has been printed.

It seems to petitioner that a reasonable interpretation of the afore-mentioned rules would avoid the

necessity of printing evidence of doubtful relevancy, unless the Court should find a necessity for some portion thereof and direct that such portion be printed.

BRIEF OF ARGUMENT.

1. *The Supreme Court will grant a writ of certiorari to review erroneous judgments of Federal appellate courts in respect to bills of exception.*

McDonald v. Maxwell, 47 Sup. Ct. Rep., 487.

In the above-cited case the Supreme Court of the District of Columbia had before it a record which, by fair construction, adequately presented the controlling issue of law. Nevertheless, in reliance upon the full measure of common-law requirements, the court declined to pass upon the merits because there was not a bill of exeeptions in the record.

Like the findings of fact and order of the Commission in the present case, however, there was in the record a report of a reference which adequately set forth the issue.

The Supreme Court of the United States granted a writ of certiorari and reversed the judgment of the intermediate court. In so doing the Supreme Court held that the report of reference was sufficient where, as in the present case, it appeared that no issue of fact had been decided by the trial court.

2. *In cases where juries have not been asked to determine issues of fact previously determined by the Commission, this Court has held that subsequent ju-*

dicial inquiry must be limited "to the ultimate question as to whether the Commission acted within its power."

Interstate Commerce Commission v. Union Pacific R. Co., 222 U. S., 541.

Illinois Central R. Co. v. Interstate Commerce Commission, 206 U. S., 441.

United States v. Louisville & Nashville R. Co., 235 U. S., 314.

In the case of Illinois Central R. Co. *v.* Interstate Commerce Commission, *supra*, this Court said:

> "The findings of the Commission are made by law *prima facie* true, and this Court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience."

3. *Exhibits filed as evidence during the trial of a law case become part of the record without being embraced in a bill of exceptions.*

Copper River & N. W. Ry. Co. v. Reeder, 211 Fed., 280.

Dalton v. Moore, 141 Fed., 311.

Hobbs v. National Bank, 93 Fed., 615.

4. *The Commission's statement of facts and reparation order state the facts in sufficient detail and completeness for a judgment to be rendered thereon without supplementing evidence.*

Spiller v. A., T. & S. F. R. Co., 253 U. S., 117, 127, 131-2.

In the Spiller case, as in the present case, the parties had admitted the charges after the Commission had ruled upon the applicable law of the case. This was held an adequate showing of the material facts.

5. *The nature and scope of the court proceedings was fixed by the status of the findings and reparation orders at the time when the suit was filed in the district court.*

Minneapolis & St. Paul R. Co. v. Peoria & P. U. R. Co., 270 U. S., 580, 586.

6. *The action lies in tort and not contract, the actionable wrong being the illegal collection of unlawful charges.*

Louisville & Nashville R. Co. v. Sloss-Sheffield S. & I. Co., 70 U. S. (L. Ed.), 94, 101.

Louisville Cement Assn. v. I. C. C., 246 U. S., 638.

Phillips v. Grand Trunk R. Co., 236 U. S., 662.

7. *Regulations enforced by the Commission within the scope of its powers supersede the common law and have controlling force and effect.*

Western Union Tel. Co. v. Esteve Bros. & Co., 256 U. S., 566.

In the Esteve case the Court held that the form of contract for transmission of telegrams, approved by the Commission, controlled the rights and liabilities arising out of error in transmitting from New York to New Orleans a message which had been delivered to

the telegraph company in Europe on a blank sheet of paper.

It seems that a domestic practice generally enforced would be quite as controlling.

8. *The Commission had power to order a refund of the demurrage charges which in this case it ordered to be refunded.*

Turner Lumber Co. v. C. M. & St. P. R. Co., 271 U. S., 259.

9. *It had power to direct that the Federal agent refund charges the "collection or enforcement" of which was "in violation of the Interstate Commerce Act."*

Transportation Act of 1920, Sec. 206(c).

WHEREFORE, because of the errors in the record of this case and the vast importance of several of the questions involved therein, the petitioner respectfully urges this Court to issue a writ of certiorari for the purpose of bringing these important questions up for final determination.

BRENTON K. FISK,
Counsel for Petitioner,
NEW YORK, N. Y.

Pet. filed suit to recover $10,356 on a reparation order of ICC. At the close of all the evidence, both party moved for a directed verdict, and court without giving reasons thereof directed for Resp. The CCA affirmed on the ground that all the evidence was not in the bill of exceptions & Ct. would presume that omitted justified the direction.

Pet. insists this is error; Resp. defends on the merits [that there was only question of law, — power of Com. 274/91 to make order — and Mo. Pac. R. v. Merchants & Scott]

The charges in question were for demurrage [for lumber on loaders' shipments]. Cars originally had been made to certain points still unsold; after arrival at these points, it had been sold and shipper had ordered its reconsignment to other points. To these other points the railroads had, before the original consignment, placed embargoes [which were in their tariff] and consequently refused to make the reconsignments. When shipper refused to do anything more, demurrage accrued.

The holding of ICC was that there was no [Tr. 35] authority to collect these charges because the tariff publishing the reconsignment rules did not specify a prohibition against reconsignment to embargoed destinations.

The bill of exceptions shows that pets. offered in evidence exhibits numbered from 1 to 6 and resps. exhibits numbered from 7 to 12. Herein was this then recited in the bill of exceptions.

59 Tr. A

That the exhibits omitted consisted of evidence etc. and were wholly irrelevant.

Resp. depends on the merits

It argues Com. erred in its holding that the Reconsignment rules had application to prohibit to Embargoed destinations

(7)

They argue that Reconsignment is privilege not a right; that if it attaches at all, it is at the date of original consignment & subject to all the rights & liabilities ~~of~~ ~~regular consignments~~ of it is as all one shipment. It is clear that shipper may require to ship an original consignment to an Embargoed destination & collect demurrage. In fact he cannot ship to an Embargoed destination unless it is in tariff. Certainly the same rule should apply to a Reconsignment where at time of original Embargo was in effect.

Complaint
Demurrer - overruled
General issue in plea
Evidence
Ltr offer in evidence
by pltf(pet) Evidence explained 51
by deft(resp) - explained 58
Objection thereto by pet "A" 58
Jury directed verdict 54

It was followed by an order of the judge as follows:

Tr. 80

And this was followed by a stipulation of parties not to print the omitted documents in bill of exceptions

CCA said:

1. While an order of ICC is prima facie evidence of facts therein stated, it is subject to rebuttal in a Court where all the issues are open. And the CCA may review.

2. The evidence here sent up in original documents apparently consists of all the evidence on the hearing before the Commission [redacted] so that it should not be presumed allowed nisi have been granted. The rule permitting sending up of original papers was never intended to have the expense of printing. So it results that the bill of exceptions does not contain all the evidence on which the case was tried. Under such circumstances, we can only presume that that omitted justified the instruction + so affirm.

Pltf. mainly argues that the court misconceived the character of the case, believed it a question of fact, and consequently that evidence was necessary.

It says there was no question of fact, but a clearcut question of power to make the order. That the bill of exceptions was no more necessary than in MacDonald v Maxwell (April 11) 475. C 497.

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Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 342.

KRAUSS BROTHERS LUMBER COMPANY,

Petitioner,

—against—

ANDREW W. MELLON, Director General of Railroads as Agent under Section 206, Transportation Act of 1920; MOBILE & OHIO RAILROAD COMPANY and ALABAMA GREAT SOUTHERN RAILROAD COMPANY,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR THE PETITIONER.

Statement of the Case.

A writ of certiorari was issued in this case under an order containing, among other things, a requirement

> "* * * that the argument be limited to the question of practice in respect to the bill of exceptions upon which the case in the Circuit Court of Appeals was made to turn."

The case below is reported at 18 F. (2d) 369.

The litigation in the present case started as a formal reparation proceeding before the Interstate Commerce Commission. Recovery of demurrage charges in the amount of $10,356 was sought. These charges had been collected because of delay or failure of the railroads themselves in respect to carrying out duly-given reconsignment instructions. There were no applicable tariff provisions specifically authorizing imposition of demurrage charges on account of embargo delays, and the Commission uniformly in such cases denied their legality. The defense was based upon the single proposition that a common-law right, superior to the Commission's power, had enabled the carriers to deny reconsignment until embargoes were lifted, and, because of this common-law right, the Commission had no power either to deny the imposition of demurrage charges for the intervening delay or to order their repayment.

The Commission's findings show that the case was narrowed down so that the only issue upon which the Commission was asked to decide was the issue of law concerning their power to order reparation, all other points being admitted or waived. The findings and order show that, upon the Commission's decision of this law point in petitioner's favor, a voluntary stipulation was filed showing the amounts recoverable if the Commission were eventually sustained in its determination of the law.

The case was carried from the Commission into the United States District Court for the Northern District of Alabama by a complaint filed pursuant to Section 16 of the Interstate Commerce Act. The findings and order

were duly attached to the complaint as a part thereof, and were as follows:*

REPORT OF THE COMMISSION.

Division 2, Commissioners Daniels, Esch and Campbell. By Division 2:

Exceptions were filed by the complainant and by the Director General of Railroads, as Agent, to the report proposed by the examiner, and the issues were orally argued.

Complanant is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. It alleges that defendants unlawfully collected demurrage and reconsignment charges on carload shipments of lumber, shipped between November 1st, 1917, and January 12th, 1918, originally billed to Meridian, Miss., Jackson, and Chattanooga, Tenn., and reconsigned at those points to numerous destinations north and east thereof. Reparation only is sought.

The lumber was loaded at mills with which complainant had contracts, located at various points in Mississippi, Alabama, Louisiana and Texas. The shipments moved into Meridian and Jackson over the Mobile & Ohio and into Chattanooga over the Alabama Great Southern. Most of them were placed in transit before being sold, so that complainant did not know the ultimate destination at the time they were started. Prior or subsequent to arrival at the reconsigning points the lumber was sold to purchasers at points in Pennsylvania, Kentucky, New Jersey, West Virginia, Ohio, Indiana, and New York, and orders

* Headings omitted in this brief. Italics wherever used in this brief, do not appear in the original text unless so indicated herein.

were transmitted to defendants directing reconsignment to the latter points. These orders defendants either refused to accept or in any event to comply with immediately, because embargoes were in effect against the points of destination from the original points of shipment, and from the reconsigning points when the shipments originated. Demurrage was assessed for the resulting detention of the cars. In some instances reconsignment charges also were collected, which defendants admit was done without tariff authority. Some of the lumber was unloaded and stored at the reconsigning points, but most of the shipments were held in the cars and moved to destinations as the embargoes were lifted from time to time. These embargoes were brought about by severe congestion of traffic throughout the east during the period in question and were constantly being modified, cancelled, and restored to meet particular emergencies.

Complainant does not question the reasonableness or necessity of the embargoes, but contends that as defendants' tariffs contained no provision against reconsignment to an embargoed point, detention of the cars was due to defendants' inability to fulfill the obligations imposed by the tariffs, and that the charges were therefore illegal. On January 13, 1918, rules became effective prohibiting reconsignment when in conflict with embargoes.

Defendants insist that complainant knew before the shipments were tendered that embargoes were in effect throughout the territory in question, and as shipments could not have been made either from the original points or locally from the points of reconsignment, billing of the shipments to the

latter points was for the purpose of evading and nullifying the embargoes. Complainant admits that it knew that embargoes were in effect generally throughout the territory in question, but states that since the final destinations were not known at the time shipments were started it could have had no knowledge that they were under embargo. It had been complainant's practice for years to reconsign at these same points, and it disclaims any intention on its part to evade the embargoes.

We have repeatedly held that when tariffs contain no restriction against reconsignment to embargoed points, demurrage charges may not be assessed for the car detention resulting therefrom. Reconsignment Case, 47 I. C. C. 590, 634; *Wood* v. *N. Y. P. & N. R. R. Co.*, 53 I. C. C. 183; *Atlantic Lumber Co.* v. *N. Y. P. & N. R. R. Co.*, 57 I. C. C. 129.

Defendants admit that demurrage should not be assessed if the final destinations were not under embargo when the shipments left the point of origin, but contend that if the points of final destination were under embargo at the time the shipments started and at the time of reconsignment the carriers are no more required to reconsign to such points than to accept the shipments at the points of origin. They argue that since the right of reconsignment attaches as of the date of shipment, even if the order be given subsequently, and since there was no obligation to accept the shipments at points of origin on account of the embargoes, there was likewise no obligation to reconsign. The obligation to accept articles tendered for transportation is governed by general principles of law, while the obligation to reconsign is determined by rules lawfully on file with us.

The right to refuse shipments temporarily for good cause by the establishment of embargoes, which are not required to be filed with us, is recognized. The right to reconsign depends entirely upon the construction of rules, which are required to be filed in the same manner as rates, and if the carriers do not restrict such rules to the extent of their capacity to perform the service, the shipper can not be held liable for the detention of cars when it is not directly responsible for such detention and can not abate the cause thereof, as in the case of an embargo, which is a disability of the carrier.

We find that the demurrage and reconsignment charges assailed were illegal; that complainant made the shipments as described and paid and bore the charges thereon; that it has been damaged in the amount of the charges found herein to have been illegally collected; and that it is entitled to reparation, with interest. Complainant should comply with Rule V of the Rules of Practice.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of November, A. D. 1922.

* * *

It appearing, That on March 2nd, 1922, the commission entered its report in the above-entitled proceedings, which is hereby referred to and made a part hereof, and these proceedings now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in ques-

tion we find that complainant is entitled to awards of reparation from the defendants named in the following table in the amounts set opposite their respective names, with interest:

Defendants	Amounts	With Interest From
James C. Davis, Director General of Railroads, as Agent	$2,894.00	June 1, 1918
Mobile & Ohio Railroad Company, and James C. Davis, Director General of Railroads, as Agent	4,530.00	July 1, 1918
Alabama Great Southern Railroad, and James C. Davis, Director General of Railroads, as Agent	2,932.00	March 20, 1918

It is therefore ordered, That the defendants named in the above table be, and they are hereby, authorized and directed to pay unto complainant, Krauss Brothers Lumber Company, on or before December 28th, 1922, the amounts set opposite their respective names in said table, with interest hereon at the rate of 6 per cent. per annum from the dates therein set forth, as reparation on account of illegal demurrage and reconsignment charges assessed on numerous carload shipments of lumber reconsigned at Meridian, Miss., Jackson and Chattanooga, Tenn.

By the Commission.

GEORGE B. McGINTY,
Secretary.

(SEAL)

Upon the trial of the case in Court no objection was made to introducing in evidence the findings and order at their face value.

The findings and order having been put in evidence, together with proof of non-payment, the petitioner closed its case. Thereupon the respondents offered, and, over petitioner's due objection, there was admitted in evidence certified copies of the records in several proceedings before the Commission, including numerous very large exhibits from the files of the Commission. Some of these records set forth the proceeding in which the reparation order there had been made which is here in suit. Others dealt only with subsequent hearings which had arisen out of an effort of the Commission, when the subject-matter of the present suit had already been duly lodged in the District Court, to reopen the case and consider new theories of law concerning it.

No evidence other than the Commission records was offered by respondents in the District Court, except an oral stipulation that only $245.00 of the entire $10,356.00 ordered to be repaid, had ever been received by respondent Mobile & Ohio Railroad Company and evidence that only $180.00 of such total sum ever had been received by respondent Alabama Great Southern Railroad Company (R., 58).

Both sides moved for a directed verdict which was given by the Court in favor of respondents, and due exception was reserved by petitioner. Thereafter, by writ of error, the action of the trial Court was duly carried up for review by the United States Circuit Court of Appeals for the Fifth Circuit. The errors set forth were the directing of a verdict for respondents and refusing to direct a verdict for petitioner.

The waiver before the Commission of all issues except the issue concerning the Commission's power to order reparation, and the respondents' refraining from timely objection to the findings and order when offered in Court as evidence, seemed to limit the case to the controversy disclosed upon the face of the findings. Therefore, in preparation of the bill of exceptions, the circumstances seemed to require the application of those principles set forth in Subsection 2 of Rule "7", "Revised Rules of the Supreme Court of the United States", which, under the heading, "BILLS OF EXCEPTION * * * OMISSION OF UNNECESSARY EVIDENCE", provides that: "The Judges of the district courts in allowing bills of exception shall give effect to the following rules:

> "2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise."

Obviously the prima facie case established by the findings and orders must have prevented direction of a verdict against petitioner on the evidence, for at least a jury issue would have arisen out of any denial of the findings.

Therefore, pursuant to the rule aforementioned, a bill of exceptions was prepared, approved and filed which fully recited all the evidence, showing the identity, subject-matter and introduction of each and every exhibit and containing the usual statement, *"This was all the*

evidence in the case". The bill disclosed, however, that some of the exhibits which had been thus mentioned, had not been fully set out but had been omitted—namely (R., 58):

1. The original pleadings before the Commission.

2. The testimony and all exhibits taken and filed in the Commission proceedings. (These were exceedingly voluminous.)

3. Petition for reopening the case. (Filed after the subject-matter had been placed in the District Court by the present suit.)

4. Correspondence of the Director General with the Commission leading up to the attempted reopening.

5. Testimony and exhibits in proceedings subsequent to the attempted reopening.

The Circuit Court of Appeals affirmed the judgment of the lower Court purely on the arbitrary rule that unless all the exhibits were shown to be embraced in the bill of exceptions the Court would decline to consider the merits of the case.

Believing such an unjust and wholly unnecessary decision in violation of Rule 7 of the United States Supreme Court, petitioner sought and obtained a writ of certiorari.

Assigned Errors Which Will Be Urged.

This appeal is limited to the question of practice in respect to the bill of exceptions upon which the case in the Circuit Court of Appeals was made to turn.

The errors assigned in the Circuit Court of Appeals, and there urged, were the directing of a verdict for

respondents and the refusal to direct a verdict for petitioner.

SUMMARY AND ARGUMENT.

1. The finding of facts and order constituted "*prima facie* evidence".

Interstate Commerce Act, Sec. 16.

2. The term, "*prima facie evidence*", has in Federal law a well-defined meaning.

Kelly v. *Jackson*, 31 U. S. (6 Pet.) 622, 631.

3. Unless "*prima facie* evidence" is "contradicted or disproved by controlling evidence on the part of the defendant", the plaintiff is entitled to recover.

Kelly v. *Jackson, supra.*

4. Furthermore, the conclusions of a commission such as the Interstate Commerce Commission, "depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor".

Illinois Cent. R. Co. v. *I. C. C.*, 206 U. S. 441;
Tilghman v. *Proctor*, 125 U. S. 136, 149.

5. The findings and order accordingly made out a complete case, rebuttable only by controlling evidence.

Spiller v. *A. T. & S. F. R. Co.*, 253 U. S. 117, 127, 131-2;
Mills v. *L. V. R. Co.*, 238 U. S. 473;
Cases cited above.

6. Conflicting evidence could only have raised a jury issue and could not under any circumstances have warranted the direction of a verdict for respondents.

7. It is clear, therefore, that only some defect in the legal theory of the case, and not insufficient evidence, could have warranted the Court's charge.

8. Failure to object to evidence constitutes a waiver of defects and, in the case of documents, admits them at their face value.

9. If the findings and order had not actually been made by the Commission but only by members of the Commission who were acting outside the scope of their official powers, then the statutory provisions making official findings of the Commission admissible would have had no application.

Church v. *Hubbart*, 2 Cranch 187;
cf. *Vitelli & Son* v. *U. S.*, 250 U. S. 355.

10. Whether the findings and order were genuine and admissible might have been raised as a preliminary question for the Judge; but, by electing to waive such a preliminary inquiry, the respondents further showed their intention to confine their defense to the single issue apparent upon the face of the findings.

Kendall v. *May*, 10 Allen (Mass.) 59, 65.

11. Furthermore, only the issues actually contested before the Commission were in litigation, all else having been admitted or waived.

T. & P. Ry. v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 435;

M. K. & T. R. Co. v. *Harriman*, 227 U. S. 657, 668;
L. & N. R. Co. v. *Ohio Valley Tie Co.*, 242 U. S. 288.

12. The bill of exceptions recites that it contains all of the evidence in the case and is duly approved.

13. It was the duty of the District Judge to require condensation of the record by eliminating therefrom irrelevant matter.

Supreme Court Rule 7, subsection 2.

14. It is conclusively shown that no evidence which would have cast any light upon any issue in the case was omitted from the bill of exceptions.

15. The Supreme Court no longer favors purely arbitrary requirements in respect to bills of exceptions.

McDonald v. *Maxwell*, 47 S. Ct. 487;
Barber Asphalt Pav. Co. v. *Standard A. & R. Co.*, 48 S. Ct. 183;
Supreme Court Rule 7, subsection 2;
cf. Equity Rule 75 (b).

16. All those proceedings in the Commission which were based upon an effort to reopen the case were void for want of jurisdiction inasmuch as the subject-matter had previously become lodged exclusively in the District Court by the filing of the present suit.

Minneapolis & S. P. R. Co. v. *Peoria & P. U. R. Co.*, 270 U. S. 580, 586.

17. Even in the District Court the three parties respondent openly agreed among themselves and with petitioner concerning the division, among themselves, of the wrongfully-acquired demurrage charges for the recovery of which this suit is maintained, thereby further admitting the facts in the case.

Bill of Exceptions (R., 57 and 77-78).

18. The parties having elected to rest their case upon rulings of law, it would be proper for judgment to be rendered against all of them in such amounts as the Court deems proper.

Beuttell v. *Magone,* 157 U. S. 154;
Interstate Commerce Act, Sec. 16.

The Interstate Commerce Act (Section 16) provides that the findings of fact and order in a reparation case shall constitute "*prima facie* evidence". In Federal law the term, "*prima facie* evidence", has been given a well-recognized meaning. It is evidence which a jury may not disregard and which is conclusive unless and until controverted or disproved "by controlling evidence on the part of the defendant", as declared by the Court in *Kelly* v. *Jackson,* 31 U. S. (6 Pet.) 622, 631, wherein the Court approved a charge "that the plaintiff had given *prima facie* evidence in support of his case, and such as was conclusive if uncontradicted and that this must be contradicted or disproved by controlling evidence on the part of the defendant, or the plaintiff is entitled to recover"; while the Court disapproved a charge that "the evidence upon the one side or the other should not be submitted to the jury as *prima facie* or presumptive

evidence, either for or against a delivery; but the whole evidence together, and from the whole, determine whether or not the deed was delivered". The Court in this connection (Story, *J.*), said:

> "What is *prima facie* evidence of a fact? It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No Judge would hesitate to set aside their verdict and grant a new trial, if, under such circumstances without any rebutting evidence they disregard it."

This Court, in *Illionis Central R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, declared as follows:

> "The findings of the Commission are made by law *prima facie* true, and this Court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience."

Furthermore, the waivers and admissions made in the trial of this case before the Commission are binding. (*L. & N. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288; *T. & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 435; *M. K. & T. R. Co.* v. *Harriman Bros.*, 227 U. S. 657, 668.)

The Commission declared that there was involved in the case only the question of its power to regulate what the carriers believed to be a practice absolutely within their common-law rights. It found for the shipper and

requested that the amount of money involved in the case be stipulated. When the stipulation was made it became binding on the Director General.

In the District Court the defendants not only made no resistance to the findings and order but actually proved in open court what portion of the disputed money had been received by each of them. This was, of course, an admission that they had received the money concerning which the Commission had rendered its findings and order.

The effect of admitting "*prima facie* evidence" without objection is discussed in *Kendall* v. *May,* 10 Allen (Mass.) 59, 65, where the Court said as follows:

> "The auditor having made his report, it is made by statute *prima facie* evidence, and nothing more. The finding as to this fact of the capacity of the defendant to testify is not conclusive, but *prima facie* only.
>
> In respect to the other facts found by the auditor, the report was to be submitted to the jury, and the evidence to contradict the report must be addressed to them. But it was not so as to this fact; for the capacity of a witness to testify is not a fact that is ever submitted to the jury, but is always decided by the Court.
>
> It would be impracticable to submit these collateral issues to the jury. The auditor's finding on the point of capacity was to be affirmed or disaffirmed in this case by the Judge, upon evidence to be presented to him. If it was affirmed, then the report was to be sent to the jury * * *."

Finally, the case of *Barber Asphalt Paving Company* v. *Standard Asphalt & Rubber Company,* 48 S. Ct. 183, is believed to be controlling. Although it was an equity

case, nevertheless Rule 7, subsection 2, applicable to the present case, and Equity Rule 75 (b), applicable to that case, are almost exactly alike—so much alike that their similarity cannot be merely accidental. Each such rule requires that the evidence be "condensed" and set forth in "narrative form". The law rule says, "Only so much of the evidence shall be embraced * * * as may be necessary to present clearly the questions of law * * *"; while the equity rule says, "The evidence shall not be set forth in full * * * all parts not essential * * * being omitted." The general structure of the two rules is the same and in meaning they are obviously identical.

In the Barber case a review *of all the evidence* was sought by appeal from the final decree. Yet the Court held that counsel had been guilty of bad practice in embracing all of the exhibits in the statement.

In the case of *McDonald* v. *Maxwell*, 47 S. Ct. 487, it appeared that the Appellate Court, as in the present case, had declined to pass upon the merits because certain facts had not been set out in a bill of exceptions, as always theretofore required by the Appellate Court. The action of the Appellate Court was reversed by the Supreme Court on the ground that the record was adequate for all practical purposes.

For the reasons aforestated, it is respectfully asked that the judgment of the Circuit Court of Appeals be reversed.

BRENTON K. FISK,
Attorney for Petitioner.

HARRY S. ELKINS,
J. P. MUDD,
Of Counsel.

Office Supreme Court, U. S.
FILED
AUG 26 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1927.

No. 342.

KRAUSS BROTHERS LUMBER COMPANY,
Petitioner,

—against—

ANDREW W. MELLON, Director General of Railroads, as Agent, and others,
Respondents.

BRIEF OF PETITIONER IN REBUTTAL, SUPPORTING PETITION FOR CERTIORARI.

BRENTON K. FISK,
Attorney for Petitioner.

IN THE

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Respondents.

BRIEF OF PETITIONER IN REBUTTAL, SUPPORTING PETITION FOR CERTIORARI.

A brief in rebuttal is filed in this case for the purpose of clarifying two of the issues. Petitioner states that a well-recognized administrative practice, enforced by the Interstate Commerce Commission, forbade the assessment of demurrage charges for embargo delays except in cases where applicable tariff provisions specifically stipulated for such charges. The respondent questions the accuracy of the statement. Brushing aside mere differences in terminology, the statement of the Commission on this point contains its own corroboration, reading as follows (R. 63):

> "We have repeatedly held that when tariffs contain no restriction against reconsignment to embargoed points, demurrage charges may not be assessed for the car detention resulting therefrom. Reconsignment case, 47 I. C. C., 590, 634; *Wood* v.

N. Y. P. & N. R. R. Co., 53 I. C. C., 183; *Atlantic Lumber Co.* v. *N. Y. P. & N. R. R. Co.*, 57 I. C. C., 129."

Respondent further argues that there is no *right* to reconsign freight—that reconsignment is a mere *privilege*. To claim the benefit of a tariff provision is not to claim a mere privilege. Under laws forbidding discrimination, tariff provisions must be uniformly applied and it is a shipper's lawful right to require that he be given the fullest benefit of any and every tariff provision.

It is clear that the only problem before the Commission in this case was to determine the extent and effect of a certain general rule of tariff construction. The parties were requested by the Commission to agree upon the charges collected of shipper in violation of this rule, which the Commission, in its formal opinion, had just declared to be law. The opinion discloses that the Commission had limited its consideration of the case to this single question of tariff construction—namely, whether the existence of an embargo will justify a refusal to comply with the provisions of a reconsigning tariff when no mention of embargoes as limitations upon reconsigning rights is contained in the tariffs. The narrowing of the case is pointedly disclosed by the following sentence in the findings (R. 63):

> "Defendants admit that demurrage should not be assessed if the final destinations were not under embargo when the shipments left the point of origin, but contend that if the points of final destination were under embargo at the time the shipments started and at the time of reconsignment the carriers are no more required to reconsign to such points than to accept the shipments at the points of origin."

Even if there were no such direct admission, there is certainly an equivalent admission to be implied from the stipulation that charges had been collected of shipper contrary to the rule of tariff construction above stated.

In petitioner's judgment, the mere existence of applicable reconsigning tariffs and the absence of any mention of embargoes as limitations upon them is all that has to appear in the record concerning tariff provisions. The case involves no fine shades of meaning in the phraseology of the several tariffs or in any embargo order. Anti-discrimination laws require that tariffs receive certainty in construction and uniformity in application. Even if some of the tariffs held out reconsignment merely as a "favor" to be granted or refused at the carrier's convenience or pleasure, nevertheless the dominating influence of anti-discrimination laws, which impose rules of definiteness and certainty, require that such provisions be construed as creating tariff rights to which all shippers may have equal benefit. It is not lawfully within the power of a carrier to grant valuable privileges to some and withhold them from others. It is for the Commission to standardize by its rules and decisions the exceptions which will legalize a refusal to comply with the terms of a tariff.

One of the rules of certainty which were applicable to the present case was, as petitioner maintains, the rule which the Commission has always applied and which is stated in the first of the foregoing quotations.

Petitioner believes that the record presents the issues adequately for review on appeal.

BRENTON K. FISK,
Attorney for Petitioner.

FILED
MAR 7 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1927—No. 342.

KRAUSS BROTHERS LUMBER COMPANY,
Petitioner,

—against—

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN REBUTTAL FOR THE PETITIONER.

BRENTON K. FISK,
Attorney for Petitioner.

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The respondents' brief seems to call for a clarifying statement on one or two points.

It has at all times been the petitioner's contention that the respondents' exhibits were irrelevant and that they had no proper place in the bill of exceptions. The respondents held a contrary opinion. In the preparation of the bill of exceptions the trial Judge, together with the attorneys for the parties, put into effect the plan, embodied in the record and recited in the respondents' brief, whereby these original exhibits were transmitted with the record to the Court of Appeals. A prime motive which

animated the petitioner to resist the inclusion of these exhibits in the bill of exceptions and printed record was, as the respondents relate, the saving of expense in preparing the record. The respondents endeavored to be fair and there is no desire on the part of the petitioner to derive a handicap from the omissions.

The petitioner rests its case upon the proposition that the printed record shows itself to be fully adequate for a decision of the present appeal.

The respondents jointly, and not severally, made the successful motion on which a verdict for all defendants was directed by the Court. Jointly, therefore, they must show themselves entitled to prevail in the present appeal.

The sequence of some of the events in this case will aid in showing, it is believed, the adequacy of the present record. It is shown that the following steps have been taken:

First, the petitioner complained to the Commission that on reconsigned shipments there had been imposed upon him demurrage charges which were unauthorized by the applicable reconsignment tariffs.

Second, the respondents replied that no reconsignment provisions of any tariff had been applicable for the reason that common-law authority, in connection with existing embargoes, had been superior to the tariff provisions. Consequently the case could not be decided upon tariff provisions.

Third, the case was expressly narrowed down to this single question of law.

Fourth, the Commission found the case governed by the reconsignment tariff provisions and requested the parties to agree upon the charges

which should be refunded if the Commission's views were sustained.

Fifth, an agreement was reached, a stipulation was filed and the Commission therefrom made its reparation order.

Sixth, an appeal of the case has now reached the Supreme Court.

Seventh, the respondents now insist that the case cannot be decided without construing the provisions of the several reconsignment tariffs which heretofore they have renounced and which may, perhaps, be found somewhere in the Commission's record.

From the Commission's report of the proceedings, if the report may be deemed reliable, it is clear that the respondents did not defend upon this additional ground which they now assert.

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Attorney for Petitioner.

HARRY S. ELKINS,
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Of Counsel.

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55003—27

In the Supreme Court of the United States

OCTOBER TERM, 1927

KRAUSS BROTHERS LUMBER COMPANY, PETITIONER

v.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, as Agent, etc., et al., respondents

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT

This is a suit to enforce orders of the Interstate Commerce Commission awarding reparation for $10,356 with interest (Rec. p. 66.) The petitioner between November 1, 1917, and January 11, 1918, made numerous shipments of lumber from various points in Mississippi, Alabama, Louisiana, and Texas consigned to itself at Chattanooga, Tenn., Meridian, Miss., and Jackson, Tenn. (R. 61.) Upon arrival, orders were given to reconsign the shipments to various destinations in the East, the principal market of the petitioner. (R. 61.)

Because these destinations were embargoed the reconsignment instructions were refused by the respondents and demurrage assessed for the detention of the cars while awaiting further instructions. (R.

61.) The Commission held that there was no authority to collect the demurrage charges[1] because the tariffs publishing the reconsignment rules did not have a rule prohibiting reconsignment to embargoed destinations. The Commission, therefore, ordered the demurrage refunded. (R. 64.)

The respondents contend that the demurrage was properly assessed because reconsignment is a privilege (not a right) which, if availed of, attaches as of the date of the original shipment, and therefore is subject to all rights, privileges, and disabilities pertaining to the original shipment, except such as are specifically waived by the tariffs permitting reconsignment. Consequently they may refuse to reconsign to a destination which is embargoed against shipments from the original point of origin without so stating in their tariffs governng reconsignment, and assess demurrage charges for detention of the cars while awaiting disposition, just as they may refuse original shipments, if billed to an embargoed destination, and collect demurrage charges while the cars are awaiting instructions, without publishing a rule in the tariffs governing the original shipments that cars will not be accepted to embargoed points.

The petitioner is in error in stating, on page 2, that the respondents "have disregarded a well-

[1] The demurrage rules and charges applied to these shipments were those published for general application, and were contained in different tariffs from those publishing the reconsignment rules and charges. The demurrage tariffs are not in question here.

known and generally recognized administrative practice upon which the Commission has uniformly insisted." See also pages 3 and 10. No "administrative practice" of the Commission is involved. This is a question of the legal rights and obligations of the respondents under general principles of law and under their tariffs.

The following additional questions were raised below. It was contended by respondent Mellon: (1) that even though the demurrage was illegally assessed, he can not be held liable for that portion which accrued for detention prior to Federal control, and which he collected for the railroad companies and paid over to them in his final settlement with them; and (2) that he, as a branch of the United States government, is not liable for costs and attorneys fees in the event the order of the Commission should be held valid.

It was also contended by the Alabama Great Southern Railroad Company that since it was not a party defendant in the proceedings before the Commission any order requiring it to pay any portion of the reparation is null and void.

A discussion of these questions will not be of any assistance in determining whether the petition for certiorari should be granted, but they are stated so that the Court may have before it a full statement of the issues in the case.

A brief consideration of the merits will show that the judgment of the District Court, that the orders

of the Commission are null and void, which was affirmed by the Court of Appeals is corrected. The reasons for the action of the Court of Appeals are immaterial.

Petitioner states (pages 8, 9, 16, and 18) that the portion of the record which was not printed, but was sent up in the original form to the Court of Appeals, is irrelevant and immaterial. That portion of the record is material and relevant, and was offered in evidence in the District Court to place before the Court the entire record which was before the Commission.

BRIEF OF ARGUMENT

Demurrage charges were legally assessed, and the Commission's orders are void

Record 58, 61–63, *Exhibit* 8.

Dietz Lumber Co. v. *A. T. & S. F. Ry.*, 22 I. C. C. 75.

Cedar Hill Coal & Coke Co. v. *C. & S. Ry.*, 17 I. C. C. 479.

Sou. Rwy. Co. v. *St. Louis Hay & Grain Co.*, 214 U. S. 297.

Wood v. *N. Y. P. & N. R. Co.*, 53 I. C. C. 183.

Carolina Portland Cement Co. v. *Director General*, 83 I. C. C. 388.

Murray v. *Director General*, 69 I. C. C. 477.

Brennan Packing Co. v. *Director General*, 77 I. C. C. 307.

Atlantic Refining Co. v. *Director General*, 57 I. C. C. 627.

Duvall v. *Director General,* 59 I. C. C. 442.

Kaw Boiler Co. v. *Director General,* 83 I. C. C. 339.

DuPont v. *Director General,* 59 I. C. C. 659.

American Paper & Pulp Association v. *B. & O. R. R.,* 41 I. C. C. 506.

North Packing & Provision Co. v. *Director General,* 73 I. C. C. 749.

Cannon Mfg. Co. v. *Sou. Rwy. Co.,* 56 I. C. C. 128.

C. & A. Ry. v. *Kirby,* 225 U. S. 155.

Davis V. Cornwell, 264 U. S. 560.

Davis v. *Henderson,* 266 U. S. 92

C. & O. Ry. v. *W. C. K. Co.,* 270 U. S. 260.

Cleveland Cooperage Co. v. *Director General,* 57 I. C. C. 423.

Lafayette Box Board Co. v. *Director General,* 59 I. C. C. 105.

ARGUMENT

The demurrage charges were legally assessed, and the Commission's orders are void

Since it is admitted that the embargoes were reasonable and necessary (R. 62), the only question is the legality of the demurrage charges which were collected for the detention of the cars at the reconsigning points while they were being held for further instructions or awaiting the lifting of the embargoes.

The respondents contend that reconsignment is a privilege (not a right) which if availed of attaches as of the date of the original shipment, and,

therefore, is subject to all rights, privileges, and disabilities pertaining to the original shipment, except such as are specifically waived by the tariffs permitting this reconsignment. Consequently they may refuse to reconsign to a destination which is embargoed against shipments from the original point of origin, without so stating in their tariffs governing reconsignment, while awaiting disposition, just as they may refuse the original shipments if billed to an embargoed destination, and collect demurrage while the cars are held awaiting instructions, without any specific provisions in their tariffs that shipments will not be accepted to embargoed points.

The Commission held that the demurrage was illegal because the obligation to accept original shipments is governed by general principles of law, while the obligation to reconsign is dependent upon the construction of the rules in the tariffs permitting the reconsignment, and that if the carriers do not restrict such rules to the extent of their capacity to perform the service, the shipper can not be held liable for the detention, since the embargo is a disability of the carrier. (R. 63–64.)

In this case the embargoes were laid before any of the cars were offered for shipment at the original shipping points. The petitioner knew when it tendered the shipments at the original points of origin that the entire eastern territory, where its principal market was located, was embargoed.

The embargoes remained in effect all during the transportation to the reconsigning points. They were still in existence when the orders for reconsigning were given, and they continued for some time thereafter. Embargoes were also in force against shipments from the reconsigning points as original points of origin to the final destinations in the East. In other words, the shipments could not have been made either from the original points of origin or locally from the points of reconsignment to the final destinations. (R. 58, 61–62.)

These facts should be kept in mind in reading the following discussion.

It is settled that reconsignment is not a right which a shipper may demand but only a privilege that becomes available to him when extended by the carrier in its tariffs.

In *Dietz Lumber Co.* v. *A., T. & S. F. Ry.*, 22 I. C. C. 75, 76, the Commission says:

> The reconsigning privilege * * * is not one to be demanded by the public as a matter of right, but it is a concession voluntarily extended by the carriers * * *.

In *Cedar Hill Coal & Coke Co.* v. *C. & S. Ry.*, 17 I. C. C. 479, 487, it is said:

> Reconsignment is a privilege—not a right to be demanded by shippers—and can only be required where necessary to correct unjust discrimination.

See also *Southern Ry. Co.* v. *St. Louis Hay & Grain Co.* 214 U. S. 297.

The theory of this privilege of reconsignment is that the shipment is in fact one shipment from point of origin to the ultimate destination, so that the privilege of reconsignment applies as of the date of the original shipment. *Wood* v. *N. Y., P & N.*, 53 I. C. C. 183.

In *Carolina Portland Cement Co.* v. *Director General,* 83 I. C. C. 388, the following appears at page 391:

> As reconsigned, the shipments became through shipments from the original shipping points to final destinations, and the applicable rates are those in effect for the through movements as of the dates of shipment from point of origin, whether joint or combination rates.

and on page 184 of the *Wood case*:

> If the rate from point of origin to ultimate destination applies as of the date of the shipment, so, too, must the right of reconsignment speak as of the date of shipment, even if the order be given subsequent.

See also *Murray* v. *Director General,* 69 I. C. C. 477, 482.

Clearly, therefore, all of the rights, privileges, and disabilities pertaining to the reconsignment attach as of the date of the original shipment, and must be determined under the facts and circumstances existing at the time the original shipment was made, unless specifically restricted or extended by the tariffs permitting the reconsignment.

It is settled that a carrier may refuse an original shipment offered to an embargoed destination (R. 63) where, as is admitted here, the embargoes are reasonable and necessary (R. 62). If a car is tendered for shipment from an original point of origin to an embargoed destination, and is refused by the carrier, demurrage is properly assessed while the car is held under load at the original point of origin.

In *Brennan Packing Company* v. *Director General*, 77 I. C. C. 307, the complainant had ordered certain cars placed for loading without stating the destination. One of the cars was actually loaded and tendered for shipment, but refused because an embargo had been placed against the destination. That car and the others which had been actually placed, but not loaded, were held under demurrage awaiting instructions from the shipper. The shipper contended that the carrier should have removed the empty cars, and that he was not liable for demurrage on the car loaded because the shipment was prevented by the embargo which was the carrier's disability. The Commission says, on page 308:

> The cars were ordered by complainant, and the carrier was under no obligation to remove them unless instructed to do so by complainant. No such instructions were given, and during the time the cars were held by complainant, they were subject to demurrage.

See also *Atlantic Refining Co.* v. *Director General,* 57 I. C. C. 627; *Duvall* v. *Director General,* 59 I. C. C. 442; *Kaw Boiler Co.* v. *Director General,* 83 I. C. C. 339; *Du Pont* v. *Director General,* 59 I. C. C. 659.

Tariffs do not specifically provide that a carrier will refuse to accept an original shipment to an embargoed destination (page 73 of Exhibit 8—the testimony before the Commission), for, as the Commission says (R. 63), the carrier's right to refuse such a shipment is governed by general principles of law well established.

Since the carrier, without any provision in its tariff, has the right, by the placing of a necessary and proper embargo, to relieve itself of its common-carrier liability to transport shipments offered, why has it not the same right with respect to a reconsignment, which attaches as of the date of the original shipment, especially as the reconsignment is not a duty imposed upon it by law, but solely a "concession voluntarily extended" to the shipper? In other words, in granting a privilege it has at least an equal right to the protection which the law gives it as when it is performing the duties imposed upon it by law as a common carrier, except to the extent it specifically by tariff waived those rights.

The embargoes themselves (Exhibit 11 to the testimony before the Commission—Exhibit 8 in the record in the District Court) by their terms prohibit reconsigning to embargoes destinations.

For example, on the first page of Exhibit 11 the embargo provides "account connecting lines embargoes Southern Railway System Lines West will not accept freight as follows for delivery to or movement via the following road, etc." This would certainly apply to a reconsigned as well as an original shipment.

Furthermore, a carrier is prohibited by law from reconsigning to an embargoed destination unless the tariff specifically permits it, because that is a special service.

It is settled that a special service can not be granted except by publication in the tariff.

In *American Paper & Pulp Association* v. *B. & O.*, 41 I. C. C. 506, the Commission condemned the practice of the carriers in giving an unlimited amount of free time for unloading at certain ports, because it was operating as a discrimination against consignees who could not avail themselves of it and was detaining the carrier's equipment unduly, stating, on page 512:

> And by Section 6 [Interstate Commerce Act] no carrier may extend "any privileges or facilities," save as these have been duly specified. But the primary duty of a carrier, is to carry. And it is not the duty of a carrier, as such, to furnish storage beyond the reasonable time necessary for unloading or removal.

See also the decisions of this Court in *C. & A. Ry. Co.* v. *Kirby*, 225 U. S. 155; *Davis* v. *Cornwell*,

264 U. S. 560; *Davis* v. *Henderson,* 266 U. S. 92; *C. & O. Ry.* v. *W. C. K. Co.,* 270 U. S. 260.

There is another point which must not be overlooked, and that is that for practical purposes an embargo has the effect of eliminating the embargoed point as a destination, and the situation then is just the same as if no such point of destination is named in the tariff. This is made clear by the Commission's decisions dealing with routes which have been embargoed. They are not available, and for practical purposes do not exist. In *North Packing & Provision Co.* v. *Director General,* 73 I. C. C. 749, the shippers claimed that they had been deprived of the right to route their shipments by reason of the permit system which was then in use on account of embargoes at New York. The Commission says, on page 752:

> Common carriers have the right, in order to prevent complete paralysis of their operating facilities, to protect themselves by embargo against acceptance of freight over a certain route or routes which may be congested. That right was exercised by defendants, and the embargo which affected complainants' shipments also affected all routes serving the port of New York and all export traffic intended for shipment to that port, except shipments for the United States Government and shipments as to which the embargo was lifted by special permit. A route that is embargoed against certain traffic

> can not be said to be available to shippers tendering such traffic. We have frequently construed section 15 to impose upon common carriers the duty, in the absence of contrary routing by the shipper, to forward shipments over the cheapest available route, and failing to do so, carriers have been found liable to the damaged shipper in the amount of the difference between the rate charged and the rate over the cheapest available route. But where, as here, because of congestion or other justifiable cause and consequent embargo, the route is not available, the carrier does not violate its duty if it refuses to accept the shipment until after the shipper agrees to a route that is available.

See also *Cannon Mfg. Co.* v. *Southern Ry.*, 56 I. C. C. 128, 130.

Consequently a destination is not available where embargoes are in effect, and for practical purposes it does not exist.

Furthermore, the petitioner did nothing to abate the demurrage, and hence can not recover. See *Cleveland Cooperage Co.* v. *Director General*, 57 I. C. C. 423, 425; *Lafayette Box Board Co.* v. *Director General*, 59 I. C. C. 105, 107.

Since the respondents were not required to state in their tariffs they would not reconsign to embargoed destinations, and since they can not reconsign to embargoed destinations in the absence of specific tariff provision permitting such a practice, the demurrage was legally collected during the

period of detention at the reconsigning points, and the Commission's orders are unlawful and void.

It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

STOKELY, SCRIVNER, DOMINICK & SMITH,
SIDNEY P. SMITH,
SIDNEY F. ANDREWS,
ALEX. M. BULL,
Attorneys for Respondents.

WASHINGTON, D. C., *July 11, 1927.*

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 342

KRAUSS BROTHERS LUMBER CO., PETITIONER

v.

ANDREW MELLON, DIRECTOR GENERAL OF RAILROADS, as Agent, etc., et al., respondents

BRIEF FOR RESPONDENTS

STATEMENT

A writ of certiorari was issued in this case, the order requiring "that the argument be limited to the question of practice in respect to the Bill of Exceptions upon which the case in the Circuit Court of Appeals was made to turn."

We make our own statement because the statement of the case in the brief for petitioner does not sufficiently set forth the facts with regard to the question now before this court and is inaccurate in certain respects, particularly the statement on page 2 purporting to set out the position of respondents in contesting the order of the Commission. It may be briefly stated that our position is that on a reconsigned shipment all of the rights, duties, and liabili-

ties of the carrier and the shipper date back as of the date of the original shipment, and, hence, since the embargoes were in effect when the shipments left the original point of origin and continued in effect while the shipments were held at the reconsigning points, the carriers have the same right to assess demurrage at such reconsigned points as they would have had to assess demurrage at the original point of origin under like conditions. The Commission held the right to lay the embargoes and assess demurrage at the original point of origin is governed by well-settled principles of law, but that the rights as to reconsignment are governed by the rules in the tariffs and consequently the carriers forfeited any rights which were not specifically reserved in the reconsigning tariffs. It is obvious, therefore, that it was important that the court have before it the tariff and other portions of the record before the Commission (see Rec. page 58 and opinion, the Court of Appeals, Rec. 96) before the court can intelligently pass upon the issues. These questions are fully discussed in our brief opposing the granting of the certiorari but are not repeated here because not relevant to the point now before the court.

This is a suit to enforce an award of the Interstate Commerce Commission. To the petition filed in the District Court to enforce the order, the defendants (respondents here) filed a "plea of general issue pleaded in short by consent, with leave to give

in evidence any matter which, if well pleaded, would be admissible in defense of the action, and have effect as if so pleaded * * *." (Rec. p. 54.)

The jury found in favor of the defendants under a directed verdict (54, 79).

The Bill of Exceptions shows that defendants introduced, amongst other evidence, Exhibits 7, 8, 9, 10, and 11, which contain all of the record before the Commission, each exhibit being described in the Bill of Exceptions (58).

The concluding paragraph of the Bill of Exceptions (59) states in part:

> By virtue of an order of the Presiding Judge, W. I. Grubb, plaintiff's Exhibit No. 6 and defendants' Exhibits Nos. 7, 8, 9, 10, and 11, respectively, are omitted from the bill of exceptions in order that they may be sent by the Clerk of the lower Court in compliance with the said order of the Presiding Judge, direct to the Court of Appeals.

The Bill of Exceptions then stated, "This was all the evidence in the case" (59).

The order of the Court reads:

> It appearing to the court that in this cause it is necessary and proper in the opinion of the court that certain original papers and documents should be inspected in the Circuit Court of Appeals upon writ of error by said court:
>
> It is therefore ordered that the following papers to-wit: Exhibits 6 to 11, inclusive, referred to and described in the bill of ex-

ceptions, be transmitted by the Clerk of this court to the Clerk of the Circuit Court of Appeals at New Orleans, La., and returned after the disposition of the writ of error to the Clerk of this Court.

The stipulation of the parties is as follows:

> The parties to this cause by their respective counsel do hereby stipulate and agree as follows:
>
> That the plaintiff's exhibit No. 6 and that the defendants' exhibits 7, 8, 9, 10, and 11 may be omitted from the bill of exceptions, and sent by the Clerk of the trial court direct to the Court of Appeals in their original form, and further that the exhibits need not be printed in the record. This agreement is made in conformity with an order of the trial court by the presiding judge that said exhibits, viz: 6, 7, 8, 9, 10, and 11 shall be omitted from the record, and sent direct by the Clerk of the trial court to the Court of Appeals.

After quoting the concluding paragraph of the Bill of Exceptions, above referred to, the order of the Court, and the stipulation of the parties, the Court states that Exhibits 6, 7, 8, 9, 10, and 11, which were before the District Court, are not included in the Bill of Exceptions and are not printed in the transcript, but that the original documents were sent up in compliance with the order, but without anything to show that they were made a part of the bill (97–98). The Court refers to its Rule 14, Paragraph 4, with regard to the

transferring of original papers from the District Court, which is similar to Paragraph 3 of Rule 9 of this Court, and says that the order transmitting the originals should not have been granted, and that Rule 14, Paragraph 4, "was never intended to permit the sending up of a mass of original documents that could have been copied in the printed record, for the purpose of saving expense" (98).

The Court concludes that all of the evidence upon which the case was tried is not in the Bill of Exceptions and consequently the exhibits sent up in original form can not be considered, and holds (99):

> Where instructions of the Court are assigned as error on a motion to direct a verdict or otherwise, unless the entire evidence pertinent to the question is in the bill, the Appellate Court must presume that the omitted evidence justified the instructions. (Citing Authorities.)

The Court affirmed the judgment of the District Court (18 F. (2d) 369) on the ground that it was unable to review it because of the state of the record (99).

ARGUMENT

As the Court of Appeals suggests, and as would seem apparent from the record, the exhibits mentioned were sent up in the original form to save the cost of printing, and it was so stated to respondents

when they were asked to sign the stipulation heretofore quoted.

Obviously, since exhibits 7, 8, 9, 10, and 11 constituted practically all the respondents' testimony, they would not have consented to any stipulation which would have omitted them completely from the Bill of Exceptions and from the consideration of the Court. Furthermore, if they had not been presumed to have been incorporated, by reference at least, in the Bill of Exceptions, there would have been no purpose in sending them up in their original or any other form because, as the Court points out, they could not have been deemed to be before the court.

The record is perhaps somewhat ambiguous on the question of their inclusion in the Bill of Exceptions. Of course, they are not printed in the Bill of Exceptions, and in that sense are omitted, but if they were not to be presumed to have been incorporated by reference in the Bill of Exceptions, there would have been no object whatever in sending them up in the original form, nor of mentioning them, and the stipulation, and the order of the Court would have been useless.

Consequently, when the record is read in connection with the fact that the exhibits were actually placed before the Court of Appeals it would seem clear that the exhibits were included by reference in the Bill of Exceptions, and the court should have considered them.

The stipulation for sending up the exhibits in original form was made in good faith by the parties, respondents, at least, having understood that this practice was proper, and that the court would consider the exhibits, and the failure to print was apparently due to an honest mistake for which the petitioner ought not to be made to suffer. Therefore, if that were the contention of petitioner, respondents would interpose no objection to the Court of Appeals or this court reviewing the entire record, including the exhibits (the petitioner being required to print them or the substance of them for the record if the court deemed that necessary).

However, the position which petitioner has taken in his brief in this Court presents an entirely different question. He contends that the Exhibits were irrelevant, and consequently under Section 2, Rule 7, should have been and were omitted from the Bill of Exceptions. That Rule requires that "only so much of the evidence shall be embraced in a Bill of Exceptions as may be necessary to present clearly the questions of law involved in the ruling to which exceptions are reserved * * *." If they were omitted because of that rule, sending them up in the original form would have been as much in violation of Rule 7 as if they had been printed in the record, and would have been a useless procedure.

The Bill of Exceptions shows (58) that when the Exhibits were offered by the defendants (the

respondents here), they were objected to on the ground that they were immaterial, irrelevant, and incompetent, and the objection was overruled (59).

Obviously, therefore, respondents would never have entered into any stipulation which would have taken away from the consideration of the Appellate Court the Exhibits which constituted practically all of their evidence in the District Court.

Furthermore, the Bill of Exceptions refers to and describes these Exhibits (58). It is manifest, therefore, from the Bill of Exceptions that there was evidence which the District Court at least deemed material, because it was admitted over objection, and which was before the District Court, but which was not before the Court of Appeals. The burden was upon the petitioner to make the record, but had the respondents not understood that under the agreement and order of the Court the Exhibits were incorporated in the Bill of Exceptions by reference, and would be considered by the Appellate Court, it is clear that they would have insisted that they be included in the Bill of Exceptions and printed, for they would never have stipulated, because petitioners deemed it irrelevant, that their evidence admitted over objection should be left out.

In this case the District Court directed a verdict upon all of the evidence. Obviously, therefore, all of the evidence is necessary in order that the Appellate Court may intelligently pass upon

the action of the District Court, as the Court of Appeals correctly states, citing authorities (99):

> Where instructions of the Court are assigned as error on a motion to direct a verdict or otherwise, unless the entire evidence pertinent to the question is in the bill the Appellate Court must presume that the omitted evidence justified the instruction.

Therefore, if the real reason for not printing the exhibits was that now contended for by petitioner, namely, that they were omitted in accordance with the provisions of Paragraph 2 of Rule 7 of this Court, this court must affirm the Court of Appeals because the Bill of Exceptions describes them and shows they were actually before the District Court when it directed its verdict.

However, as stated before, respondents at the request of petitioner signed the stipulation above quoted upon the statement to them that it was for the purpose of saving the cost of printing, and they understood that the rules of the Court of Appeals would permit it. They understood the entire record, including the exhibits sent up in original form, would be considered by the Court of Appeals and the case determined upon its merits. Consequently they do not now object to such action by the Court of Appeals or this Court. Their only concern is that those Exhibits should not now be held to be not before the Court under Paragraph 2 of Rule 7. Such a ruling would penalize the re-

spondents by omitting substantially all of their evidence from the record, because they had agreed to a procedure which they were advised was taken to save petitioner expense and place the entire testimony before the Court. Otherwise would not have consented.

Respectfully submitted.

STOKELY, SCRIVNER, DOMINICK & SMITH,
SIDNEY P. SMITH,
SIDNEY F. ANDREWS,
ALEX. M. BULL,
Attorneys for Respondents.

WASHINGTON, D. C. *February 24, 1928.*

In the Supreme Court of the United States

OCTOBER TERM 1927

No. 342

KRAUSS BROTHERS LUMBER COMPANY, PETITIONER

v.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, as Agent, etc., et al., respondents

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MOTION BY RESPONDENTS TO AMEND JUDGMENT AS TO COSTS AND RETAX COSTS

Now come the respondents and, leave first having been asked and obtained, move the Court to amend the judgment in this case so as to tax the costs in this Court against the petitioner instead of against the respondents, for the reason that the Writ of Certiorari was granted to consider a question of practice which arose because of the manner in which the record in the Circuit Court of Appeals was prepared by petitioner and for which the petitioner was solely and entirely responsible.

The opinion of this Court rendered April 9, 1928, does not state that costs will be assessed against respondents, but we understand that under paragraph 3 of Rule 29 the costs will be assessed against respondents in the absence of a ruling by the Court

to the contrary, the judgment of the Court of Appeals having been reversed.

This case was brought in the District Court to enforce an order of the Interstate Commerce Commission against respondents[1] for $10,365, demurrage charges, alleged to have been illegally collected.

The District Court directed a verdict in favor of the respondents. (R. 79.) The duty of preparing the record for the Court of Appeals, therefore, rested primarily upon petitioner. In order to avoid the cost of printing certain exhibits (see page 2 of the opinion of this Court, and the opinion of the Court of Appeals, R. 98) petitioner requested respondents to stipulate that certain exhibits should be sent up to the Court of Appeals in original form, which was done (R. 59, 80, 82). One of those exhibits was a part of petitioner's evidence. At no time did petitioner ask respondents to acquiesce in any other method of preparing the record. Respondents have never questioned this procedure nor sought to take advantage of the manner in which the record was made up.

"The Circuit Court of Appeals, of its own motion, and not by request or consent of either party"

[1] The opening paragraph of the opinion of this Court states that the Commission ordered the Mobile & Ohio Railroad and the Alabama Great Southern Railroad Company to pay the reparation. The orders are against the Director General of Railroads as well as the two railroad companies named (Rec., pp. 65–69, 76), the greater portion of the reparation being against the Director General of Railroads (Rec., 57, 66, 76).

(see page 4 of this Court's opinion), held that the matter sent up in the original form was not a part of the Bill of Exceptions and could not be considered by it, and consequently affirmed the judgment of the District Court, applying the rule that where the Bill of Exceptions does not contain all the evidence, it will be presumed that the evidence omitted was sufficient to justify the action of the Court in directing the verdict.

Petitioner then applied to this Court for a Writ of Certiorari, which was granted, with the order that the argument be limited to the question of practice in respect to the Bill of Exceptions upon which the case in the Court of Appeals was made to turn. (R. 102.) Reference to respondents' brief opposing the Writ of Certiorari (pages 3 *et seq.*) will show that objection to granting the Writ was based solely on the merits of the case and not upon the state of the record. Respondents' brief filed in this Court after the granting of the certiorari shows (pages 5, 7, 9) that again respondents made no objection to the manner in which the record was prepared, but opposed petitioner only on his contention that the exhibits had been omitted because irrelevant, and it was distinctly stated by respondents that they did not oppose a review by the Court of Appeals of the case on the merits on the entire record, as they understood that the exhibits had not been printed in order to save the petitioner the cost of so doing.

At the oral argument in this Court respondents again stated that they had no objection whatever to the Court of Appeals considering the case on its merits on the entire record; that they had briefed and argued the case to the Court of Appeals upon the entire record which they understood was before it, and that the only opposition that respondents made to the petitioner's argument in this Court was to the contention that the exhibits referred to had been omitted from the Bill of Exceptions in accordance with paragraph 2 of Rule 7 of this Court, because irrelevant.

In other words, throughout this case respondents not only have not opposed the method in which petitioner prepared the record, but have actually cooperated with him in every way, as far as they have been requested, in the preparation of the record in an effort to save the petitioner the cost of printing evidence, some of which was his own, and the remainder of which was introduced and admitted by the Court over objection that it was irrelevant.

It is manifestly unjust, therefore, that respondents should now be penalized by being required to pay the costs of bringing the case up to this Court on certiorari on the question of practice which arose entirely because of petitioner's method of preparing his record.

It is respectfully requested, therefore, that the judgment rendered April 9, 1928, be amended so as to tax against the petitioner, and not against

respondents, the costs accruing in connection with the Writ of Certiorari granted October 24, 1927.

Respectfully submitted.

STOKELY, SCRIVNER, DOMINICK & SMITH,
SIDNEY P. SMITH,
SIDNEY F. ANDREWS,
ALEX. M. BULL,
Attorneys for Respondents.

WASHINGTON, D. C., *April 18, 1928.*

CERTIFICATE OF COUNSEL

I hereby certify that I have prepared the foregoing Motion, and in my opinion it is well founded, and it is not interposed for delay.

ALEX. M. BULL,
Of Counsel for Respondents.

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SUPREME COURT OF THE UNITED STATES.

No. 342.—October Term, 1927.

Krauss Brothers Lumber Company, Petitioner, *vs.* Andrew W. Mellon, Director General of Railroads, as Agent, etc.; Mobile & Ohio Railroad Company and Alabama Great Southern Railroad Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 9, 1928.]

Mr. Chief Justice Taft delivered the opinion of the Court.

Krauss Brothers Lumber Company is a corporation engaged in the wholesale lumber business, to whom the Interstate Commerce Commission, on the complaint of the company, ordered the respondent railroad companies, the Mobile & Ohio Railroad and the Alabama Great Southern Railroad Company, to pay reparation in the amount of $10,356 because of unlawful demurrage charges illegally collected. The sole issue was whether any such power had been vested in the Commission as would give it jurisdiction to decide that the charges should be refunded. Upon the Commission's decision that it had such power, the parties, following its suggestion, filed formal stipulations under Rule V of the Commission's practice admitting the amounts of the charges, the illegality of which had been declared by the Commission, and thereupon the reparation order was made.

The view of the defendants was that the Commission had no power to order a return of these demurrage charges, since by the common law, quite outside the functions and powers of the Commission, a carrier could reject a tender of goods for initial transportation while there were existing embargoes, and in the same way could reject a demand for reconsignment to points embargoed at the time of initial acceptance for shipment, and so demurrage had accrued until the consignees accepted actual delivery of the

goods. Payment not having been made on or before December 28, 1922, as directed by the Commission, the present suit was filed by the petitioner as plaintiff against the respondents as defendants on March 20, 1923, in the United States District Court for the Northern District of Alabama. The complaint conformed to the provisions of Section 16, of the Interstate Commerce Act, and contained the findings and order of the Commission as a part thereof.

The case came on for trial, demurrers to the complaint were overruled, additional counts were inserted by amendment and a demurrer to them was also overruled. Thereupon the shipper, as plaintiff, duly introduced into the evidence the Commission's original finding and other Commission proceedings and closed its case. The respondents, over the shipper's objection that the same were incompetent, were permitted to put in evidence the original pleadings before the Commission, and the testimony and other exhibits taken and filed in the Commission's proceedings. Thereupon the respondents closed their case and the shipper duly moved for a directed verdict, which motion was overruled by the District Court and an exception noted. The respondents thereupon moved for a directed verdict, which motion was granted and the shipper duly excepted.

A writ of error to the Circuit Court of Appeals for the Fifth Circuit was then duly taken. The exhibits filed by the respondents were exceedingly voluminous, there being, among other things, a complete file of embargo circulars included as a part of the evidence which had been placed before the Commission in the hearings before it. The defeated party was anxious to avoid the printing of exhibits which it did not deem of use to the reviewing court in passing on what it considered the only issue in the case and attempted to secure this through stipulation of counsel and by an order of court. When the case reached the Circuit Court of Appeals, it declined to pass upon the merits of the case, for the following reason:

"From the above it is plain that all of the evidence upon which the case was tried is not in the bill of exceptions. The order of Court sending up the documents in the original does not purport to make them a part of the bill of exceptions, the rule of this court could not incorporate them therein, and the agreement of counsel expressly excludes them.

"As applicable to the deficiency of the record here shown the well settled rule is this. Depositions, exhibits or certificates not contained in the bill of exceptions can not be considered even though found in the printed transcript. The parties by their affi-

davits or agreements can not cause that to become a bill of exceptions which is not such in a legal sense. Where instructions of the court are assigned as error on a motion to direct a verdict or otherwise, unless the entire evidence pertinent to the question is in the bill, the Appellate Court must presume that the omitted evidence justified the instruction."

Except as modified by statute, the rules as to bills of exceptions in the Federal courts are the same as they were at common law. By Section 17 of the Judiciary Act of 1789, (ch. 20, 1 Stat. 73, 83) all the courts of the United States were given power to grant new trials in cases where there had been a trial by jury, for reasons for which new trials had usually been granted in the courts of law. This was held to adopt the common law rule on the subject. *Parsons* v. *Bedford,* 3 Pet. 433. Prior to the statute of Westminster, II (13th Edw. I, ch. 31) a writ of error at common law could be had only for an error apparent on the face of the record or for an error in fact, such as the death of a party before judgment, but by that old statute which is now to be treated as common law it was provided that exceptions might, by bills of exceptions, be made a part thereof and so be reached by the writ of error. In this way so much of the facts of the case as were necessary to make plain the question of law on which the exception was founded were incorporated in the record, but the trial justice, as a witness to the bill, had to put his seal to the instrument and in the reviewing court might be commanded to appear at a certain date either to confess or deny his seal, and then if he could not deny his seal the court of review proceeded to judgment according to the same exception as it ought to be allowed or disallowed. *Nalle* v. *Oyster,* 230 U. S. 165, 176, 177; *Duncan* v. *Landis,* 106 Fed. 839, 844; *Defiance Fruit Co.* v. *Fox,* 76 N. J. L. 482, 489.

By the Act of June 1, 1872 (ch. 255, 17 Stat. 196, 197) it was provided that a bill of exceptions allowed in any cause should be deemed sufficiently authenticated if signed by the Judge of the Court in which the cause was tried or by the presiding Judge thereof, if more than one judge sat at the trial of the cause, without any seal of the court annexed thereto, and this became Section 953 of the Revised Statutes. Since the passage of that Act, it is not necessary to seal a bill of exceptions. *Herbert* v. *Butler,* 97 U. S. 319, 320; *Maloney* v. *Adsit,* 175 U. S. 281, 285, but the signature is still necessary. *Origet* v. *United States,* 125 U. S. 240;

United States ex rel. Kinney v. *United States Fidelity & Guaranty Co.*, 222 U. S. 283.

Strict requirements are thus insisted on so as to make certain that the reviewing court shall have before it an accurate account of the evidence or exhibits, which were before the trial court in the original hearing of the issues of the case, properly certified.

The same strictness prevails as to including in the bill the evidence upon which reliance is had to justify the exception, if not included in the original record. In many cases the error complained of rests on a negative showing that there was no evidence adduced at the trial upon which the ruling of the court complained of could be predicated. If a motion is made in the trial court to take the case from a jury, or other fact-finding tribunal, and direct a verdict or give judgment on the ground that, as a matter of law, only one verdict or judgment can be reached, it must appear that in the bill of exceptions is contained all the evidence actually adduced before the trial court. It has always been ruled in such a case that if the bill of exceptions does not contain all the evidence, it will be presumed that the evidence omitted was sufficient to justify a refusal to grant the motion. *Russell* v. *Ely*, 2 Black, 575, 580; *City* v. *Babcock*, 3 Wall. 240, 244; *Grand Trunk Railway Co.* v. *Cummings*, 106 U. S. 700, 701; *Texas & Pacific Railway Co.* v. *Cox*, 145 U. S. 593, 606; *Hansen* v. *Boyd*, 161 U. S. 397, 403; *United States* v. *Copper Queen Mining Co.*, 185 U. S. 495, 498; *Nashua Savings Bank* v. *Anglo-American Co.*, 189 U. S. 221, 231. By this it is not meant that the evidence shall be set forth at length in the words of the witnesses, and of the writings and documents admitted, but only that the purport and substance of all of it be included. In setting it forth, regard should be had to the requirements of paragraph 2 of Rule 4 of the Rules prescribed by this Court. 222 U. S. —, Appendix, p. 8. *Lincoln* v. *Claflin*, 7 Wall. 132, 136; *Zellers' Lessee* v. *Eckert*, 4 How. 289, 297, 298.

The question here arises because of the alleged omission of certain exhibits from the bill of exceptions, which the petitioner contended were not relevant to the issue between them. Because of this, the Circuit Court of Appeals, of its own motion, and not by request or consent of either party, applied the rule above stated. We do not think, however, that the bill of exceptions can be said to have omitted these exhibits or to have prevented the Circuit Court of Appeals from considering them with all the evidence.

The bill of exceptions recites that in the trial both parties appeared by counsel, the jury was impanelled, and that there were introduced in evidence by the plaintiff exhibits 1, 2, 3, 4, 5 and 6, all as described; that they were admitted subject to objection and exception as irrelevant and the objection was overruled; and that the defendants offered exhibits No. 7, No. 8, No. 9, No. 10, No. 11 and No. 12, all as described, and as containing all the testimony, and also exhibits offered at the hearing before the Interstate Commerce Commission, and that the plaintiff objected to the introduction of all those exhibits from No. 7 to No. 12, and that this objection was overruled and an exception noted. The bill of exceptions then concluded as follows:

"The plaintiff's exhibits referred to as Exhibit No. 1, Exhibit No. 2, Exhibit No. 3, Exhibit No. 4, Exhibit No. 5, and the defendants' Exhibit No. 12 are hereinafter set forth fully as a part of this bill of exceptions. By virtue of an order of the Presiding Judge, W. I. Grubb, plaintiff's Exhibit No. 6 and the defendants' exhibits numbers 7, 8, 9, 10 and 11, respectively, are omitted from this bill of exceptions in order that they may be sent by the Clerk of the lower court, in compliance with the said order of the Presiding Judge, direct to the Court of Appeals.

"This was all the evidence in the case.

"(Signed) W. I. GRUBB."

This was followed by the stipulation signed by the attorneys for both plaintiff and defendants, and the order of the Court, the latter being that referred to in the bill of exceptions, as follows:

"It appearing to the court that in this cause it is necessary and proper in the opinion of the court that certain original papers and documents should be inspected in the Circuit Court of Appeals upon writ of error by said court:

"It is therefore ordered that the following papers, to wit: Exhibits 6 to 11, inclusive, referred to and described in the bills of exceptions, be transmitted by the Clerk of this court to the Clerk of the Circuit Court of Appeals at New Orleans, La., and returned after the disposition of the writ of error to the Clerk of this Court.

"The parties to this cause by their respective counsel do hereby stipulate and agree as follows:

"That the plaintiff's exhibit No. 6 and that the defendants' exhibits 7, 8, 9, 10 and 11, may be omitted from the bill of exceptions, and sent by the Clerk of the trial court direct to the Court of Appeals in their original form, and further that the exhibits need not be printed in the record. This agreement is made in conformity with an order of the trial court by the presiding judge that

said exhibits, viz.: 6, 7, 8, 9, 10 and 11 shall be omitted from the record, and sent directed by the Clerk of the trial court to the Court of Appeals".

While the rule as we have shown by its history in respect to the inclusion of all the evidence in the bill of exceptions must be respected, we must give the recitals of the bill a reasonable construction. *Kleinschmidt* v. *McAndrews,* 117 U. S. 282, 286; *Waldron* v. *Waldron,* 156 U. U. 361. While it may be said that the form in which this bill of exceptions is sent up is in its parts slightly inconsistent in itself and apparently self-contradictory, it is clear that the bill as signed by the trial court, and read in the light of the order which is referred to and identified in the bill, brought and was intended to bring to the appellate court all of the evidence heard in the court below, and all the exhibits, even those said in it to be omitted therefrom which were *ex industria* sent by order of the court to the court above for that court's examination. We think the references in the bill to the exhibits separately sent by order of the trial court to the Circuit Court of Appeals are sufficiently identified as part of the bill. They were omitted from the bill in the sense only that they were to be sent separately from the rest of the bill to the reviewing court perhaps with a view, rightly or wrongly, to avoiding the necessity of printing them. But the certificate of the Judge certainly included them in the bill when, after expressly referring to them, he said "This was all the evidence in the case." To be sure, it is well settled that exhibits found in the record or even annexed to a bill of exceptions when not attached to it by way of identifying them as intended to be part of it can not be treated as such. *Bank* v. *Kennedy,* 17 Wall. 19, 29; *Reed* v. *Gardner,* 17 Wall. 409, 411; *Jones* v. *Buckell,* 104 U. S. 554; *Hanna* v. *Maas,* 122 U. S. 24.

But in *Leftwich* v. *Lecanu,* 4 Wall. 187, on page 189, Mr. Justice Miller, while exemplifying this principle, said in rejecting a bill of exceptions:

"If a paper which is to constitute a part of a bill of exceptions, is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions."

And again, in *Jones* v. *Buckell, supra,* at 556, Chief Justice Waite, in making a similar ruling, said:

"Of course, evidence may be included in a bill of exceptions by appropriate reference to other parts of the record, and if that had been done here it might have been enough."

As we have said, we think the identifying references, in the bill, to the exhibits are sufficient.

The result is that the Circuit Court of Appeals should have considered the issues before it on the bill of exceptions as containing all the evidence below, and that the dismissal for lack of it was erroneous.

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings.

A true copy.

Test:

Clerk, Supreme Court, U. S.